No. 87-1696

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHMOND NEWSPAPERS, INC.,
and
CHARLES E. COX,

Petitioners,

v.

VERNELLE M. LIPSCOMB,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

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QUESTION PRESENTED[1]

Is a public high school teacher a *New York Times v. Sullivan* public official in a libel action based on a newspaper article containing criticism of her teaching performance and ability?

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[1] All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the instant petition. Petitioner Richmond Newspapers, Inc., is a wholly owned subsidiary of Media General, Inc.

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The petitioners, Richmond Newspapers, Inc., and Charles E. Cox, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 234 Va. ___ , 4 V.L.R. 961. It is reprinted in the appendix at 1a-28a.

The ruling of the trial court that respondent was a public official has not been reported. It is reprinted in the appendix at 29a-30a.

JURISDICTION

The Supreme Court of Virginia entered judgment on October 30, 1987, reversing the trial court's determination that respondent was a public official, and on January 15, 1988, denied the petitioners' timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const. amend I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U. S. Const. amend XIV, §1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This action arose from an article published in the August 16, 1981, edition of the Richmond Times-Dispatch, a daily newspaper, entitled "Questions About Teachers Hard To Pursue."[2] The article was written by Charles Cox, the education reporter for the newspaper, and concerned problems encountered by parents and students when they had complaints about teachers in the Richmond Public Schools. Among other things, the article reported on the specific complaints

[2] Fifteen copies of the article have been lodged in the clerk's office.

that a number of parents and students had raised about the respondent, Vernelle Lipscomb, who at the time of publication was a teacher of honors english and acting head of the english department of a Richmond public high school. By her own account, respondent estimated that she had been responsible for the education of between 2,600 and 3,000 students through the course of her career. Appendix ("App.") at 96a.

Slightly more than one month before trial, petitioners moved the trial court to hold that respondent was a public official subject to the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and succeeding cases. App. at 31a-32a. On July 18, 1983, the trial court so ruled. App. at 29a-30a.

The case was tried over five days from August 8-12, 1983. During the trial, respondent moved the court to reconsider its determination that she was a public official. The trial court adhered to its earlier ruling. App. at 97a-98a.

At the conclusion of respondent's case, the trial court denied petitioners' motion to strike the evidence on the grounds that there was insufficient proof of actual malice, although it ruled that under state law punitive damages could be awarded only against the reporter, Cox. App. at 99a-101a. At the conclusion of all the evidence the case was submitted to the jury, which was instructed that respondent could recover damages only if she proved that petitioners published with actual malice. App. at 102a. The jury returned a verdict in favor of respondent, awarding her one million dollars in compensatory damages against both

petitioners, and forty-five thousand dollars in punitive damages against the reporter alone. App. at 103a.

Petitioners filed post-trial motions seeking to have the verdict set aside and judgment entered in their favor, or in the alternative, a new trial or remittitur. App. at 104a. The trial court denied petitioners' motions to set aside, but ordered that respondent remit nine hundred thousand dollars of the compensatory damage award or face a new trial. App. at 106a-109a. The remittitur was accepted under protest by respondent, and final judgment was entered by the trial court on February 22, 1984. App. at 110a-112a.

On appeal, petitioners raised a number of issues, including the insufficiency of the evidence to support the jury's finding of actual malice. Respondent assigned cross-error to the trial court's determination that she was a public official. App. at 113a-114a. In its opinion of October 30, 1987, the Supreme Court of Virginia held that respondent had not proved that petitioners published with actual malice. App. at 11a-19a. At the same time, the Virginia court held that the trial court erred in ruling that the respondent was a public official. App. at 4a-9a. It thus reversed the award of punitive damages against the reporter, but affirmed the compensatory damage award on the grounds that there had been sufficient evidence of negligence presented to support the verdict under the private figure standard of liability applicable in Virginia.

Petitioners filed a timely petition for rehearing solely on the question of respondent's public official status. App. at 115a-116a. That petition was denied on January 15, 1988. App. at 117a.

REASONS FOR GRANTING THE WRIT

There are four reasons why the Court should grant this petition:

1. Uncertainty exists over the constitutional standard for determining the public official status of lower level government employees. Although the Court has made it clear that those charged with formulating governmental policy are public officials, it has never examined the status of those entrusted with the responsibility for implementing and enforcing policies made by others.

2. Faced with this uncertainty, state courts, purportedly applying the same constitutional rule, are reaching opposite results in their consideration of the public official status of public school teachers. These courts, moreover, have offered widely divergent rationales in support of their irreconcilably conflicting conclusions.

3. Those cases holding that public school teachers are not public officials are in conflict with decisions of this Court. In several recent cases the Court has examined the role played by school teachers in a democratic society, and has recognized that they possess the precise attributes that determine public official status.

4. In considering the public official status of lower level government employees, many state courts are misreading *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Relying on *Gertz*, those courts are emphasizing the personal notoriety of individual officials rather than focusing on the power that they wield. While concepts of notoriety are relevant to the public figure

analysis, they have no place in determining public official status.

I. THERE IS UNCERTAINTY OVER THE PUBLIC OFFICIAL STATUS OF THOSE EMPLOYEES WHO IMPLEMENT, BUT DO NOT FORMULATE, GOVERNMENT POLICY

Because they determine the amount of "breathing space" allowed for free expression, the rules adopted by this Court to ascertain an "individual's status as 'public' or 'private' powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish." *The Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985) (Brennan and Marshall, J.J., dissenting from denial of certiorari). Yet, even though the constitutional stakes involved in the public official determination are quite high, those rules remain largely undefined. In one decision the Court set forth broad, general guidelines for considering the public official issue, but did not directly address the status of those government officials who, while not policymakers, are responsible for implementing and enforcing the policies made by others. *See Rosenblatt v. Baer*, 383 U.S. 75 (1966). More recent decisions, moreover, have provided no additional guidance as to which government employees qualify as public officials. *See Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . ." 376 U.S. at 283 n.23. That case, of course, involved an elected official, a category of persons that

has since uniformly and without question been recognized as subject to the actual malice standard of liability. *See generally* R. Sack, *Libel, Slander and Related Problems* 190 (1980) ("All elected officials are 'public'. . . .").

Two years later some gloss was added to the rules governing public official status. Although again refusing to draw any "precise lines," the Court explained in *Rosenblatt v. Baer* that the *New York Times* standard applied to those government employees holding positions of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . ." 383 U.S. at 85-86. As was the case in *New York Times*, the plaintiff in *Rosenblatt* was a policymaker; the decision did not directly address the status of those given the power to enforce policy made by others.

In the intervening twenty two years since *Rosenblatt* was decided, the Court has revisited the public official issue only twice, and those decisions shed no additional light on the subject. *Gertz v. Robert Welch, Inc.*, quickly dismissed an attempt to "sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition." 418 U.S. at 351. Three years later, the Court refused to decide whether a private researcher who sought and accepted a federal grant was a public official, remarking only that "[t]he Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

Although the decisions make clear that those charged with formulating governmental policy are public officials, never has the Court examined the extent to which those given the power to implement and enforce the policies of others are subject to the *New York Times* standard. As a result, in their struggle to apply the constitutionally mandated standard, lower courts are reaching conflicting results. *Compare, e.g.*, App. at 4a-9a (Virginia Supreme Court's decision holding public school teacher is not a public official) *with Auvil v. The Times Journal Co.*, 10 Med.L.Rep. (BNA) 2302 (E.D. Va. 1984) (holding receptionist at public pediatric clinic is a public official). Nowhere is this inconsistency more apparent that in the consideration of the public official status of public school teachers.

II. STATE COURTS ARE IN CONFLICT OVER THE PUBLIC OFFICIAL STATUS OF PUBLIC SCHOOL TEACHERS

Not only are lower court decisions split on whether public school teachers are public officials, but their views on the place of public education in the scheme of government differ markedly.

Courts in Arizona, Arkansas, New York, and Oklahoma have held that public school teachers are public officials. *See Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (1978); *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973); *Mahoney v. Adirondack Publishing Co.*, 123 A.D.2d 10, 509 N.Y.S.2d 193 (N.Y. App. Div. 1986), *rev'd on other grds*, 71 N.Y.2d 31, 523 N.Y.S.2d 480 (1987); *Deluca v. New York News*, 109 Misc. 2d 341, 438 N.Y.S.2d 199 (N.Y.Sup.Ct. 1981); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 Okla. (1978). Courts in Virginia, California,

Florida, Maine, and Texas have held that public school teachers are not public officials. *Franklin v. Lodge 1108, Benevolent and Protective Order of Elks*, 97 Cal. App. 3d 915, 159 Cal.Rptr. 131 (Cal. Ct. App. 1979); *Nodar v. Galbreath*, 462 So.2d 803 (Fla. 1984); *True v. Ladner*, 513 A.2d 257 (Me. 1986); *Poe v. San Antonio Express-News Corp.*, 590 S.W.2d 537 (Tex. Ct. Civ. App. 1979). Courts in Illinois are not sure; one district of the appellate court has ruled that public school teachers are public officials, while another district has held that they are not. *Compare Basarich v. Rodeghero*, 24 Ill. App.3d 889, 321 N.E.2d 739 (Ill App. Ct. 1974) *with McCutcheon v. Moran*, 99 Ill App. 3d 421, 425 N.E.2d 1130 (Ill. App. Ct. 1981). The Ohio Supreme Court has changed its mind on the question. The Court initially ruled that a public school teacher is not a public official, but subsequently overruled this decision and held the opposite. *See Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *cert. denied*, 474 U.S. 953 (Brennan and Marshall, J.J. dissenting), *overruled*, *Scott v. The News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

The reasoning advanced by the courts in support of their varying positions reveals widely disparate views of government's responsibility for educating the citizenry and the school teacher's role in fulfilling that responsibility. In Illinois and Oklahoma teachers have been recognized to be public officials in part because education is a "prime" or "obvious" governmental function. *Basarich*, 321 N.E.2d at 742; *Johnston*, 583 P.2d at 1103. In Maine, however, where school teachers are not public officials, "education is not uniquely governmental . . . ." *True*, 513 A.2d at 264. Califor-

nia, part of Illinois, and Maine view the responsibility of school teachers for the conduct of government as "at most remote and philosophical." *Franklin*, 159 Cal. Rptr. at 136; *True*, 413 A.2d at 263-64; *see McCutcheon*, 425 N.E.2d at 1130. In New York, on the other hand, teachers perform a "vital and sensitive" function, *Deluca*, 438 N.Y.S.2d at 204, and in Oklahoma there is "no higher community involvement touching more families and carrying more public interest" than the function of teachers, *Johnston*, 583 P.2d at 1103. The Ohio Supreme Court once believed that classifying teachers as public officials would "unduly exaggerate" that category, *Milkovich*, 473 N.E.2d at 1196, but has since decided that this really is not so, *Scott v. The News Herald*, *supra*.

Obviously the Court's guidance is needed. If, when commenting on public education and the performance of public school teachers, the commentator must rely on these conflicting cases to guess at how a given court will rule, the breathing space that *New York Times*, *Gertz*, and other decisions were designed to provide will be illusory at best.

III. CASES HOLDING THAT PUBLIC SCHOOL TEACHERS ARE NOT PUBLIC OFFICIALS CONFLICT WITH RECENT DECISIONS OF THIS COURT THAT RECOGNIZE THE POWER AND IMPORTANCE OF TEACHERS IN OUR DEMOCRATIC SYSTEM OF GOVERNMENT

When it defined the public official classification in *Rosenblatt*, the Court sought to protect speech about officials, like public school teachers, who hold important and responsible positions in government:

> [T]he 'public official' designation applies at the very least to those among the hierarchy of gov-

> ernment employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

383 U.S. at 85. Courts deciding that school teachers are not public officials have read this statement far too narrowly, emphasizing only the status of the policymakers while ignoring the importance of policy implementors—those with "responsibility for or control over *the conduct of* governmental affairs." The Supreme Court of Virginia, for example, wrote: "There has been no showing that Lipscomb, who was not an elected official, either influenced or appeared to influence or control any public affairs or school policy." App. at 8a. The California Court of Appeals was more direct, reasoning that *Rosenblatt* applied only to criticism of those who "control the conduct of government." *Franklin* 159 Cal. Rptr. at 136; *see also True*, 513 A.2d at 264.

Apart from imposing a forced limitation on the *Rosenblatt* language, such expressions completely ignore plain statements by this Court that public school teachers are responsible for, and do indeed control, "the conduct of governmental affairs." In *Bernal v. Fainter*, 467 U.S. 216, 220 (1984), the Court recognized that:

> [T]eachers, like police, possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation. They have direct, day-to-day contact with students, exercise unsupervised discretion over them, act as role models, and influence their students about the government and political process.

Because of their extremely important role in exercising discretionary authority over the Nation's children in the performance of a basic governmental function, public school teachers as a class fall within a narrow exception that allows discrimination against aliens otherwise prohibited by the Equal Protection Clause. *See Ambach v. Norwick*, 441 U.S. 68 (1979). While they may not establish policy, it is the teachers, not the policymakers, who implement and enforce the policy.

> Within the public school system, teachers play a critical role in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classroom and in other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course materials are communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influ-

> ence is crucial to the continued good health of a democracy.

Ambach, 441 U.S. at 78-79.

In the system of compulsory education that is a basic foundation of this country's commitment to informed self government and ordered liberty, public school teachers are not to be confused with school secretaries, or file clerks, or school custodians. It is the teachers who are the "prime ingredient of a successful education program." See App. 92a (Standards of Quality for Public Schools in Virginia). It is they who have a "degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring) (holding that public school teachers may conduct warrantless searches of students even where no probable cause exists); *see* App. at 96a-97a (respondent's testimony that she had regular, direct contact with students and their parents both as to academic and personal matters). Most assuredly, the public does have a high degree of independent interest in the qualifications and performance of these people who so directly affect their lives. The tendency of some courts to emphasize the importance of the policymakers to the total exclusion of the importance of those persons who have broad discretion and responsibility for the administration of policy and direct contact with the public should be corrected.

IV. COURTS HOLDING THAT PUBLIC SCHOOL TEACHERS ARE NOT PUBLIC OFFICIALS HAVE MISINTERPRETED *GERTZ V. ROBERT WELCH, INC.*

In ruling that a teacher is not a public official, the Supreme Court of Virginia found guidance in the dictum from *Gertz* that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements . . . ." 418 U.S. at 344. Following this reasoning, the Virginia court appears to have given significant weight to Lipscomb's lack of access to the media in finding her to be a private person. App. at 6a. Other courts have similarly read *Gertz* to require that they analyze the access that particular teachers have to the press. *See, e.g., True,* 513 A.2d at 264. Indeed, one court has gone so far as to suggest that *Gertz* modified the standard enunciated in *Rosenblatt. Poe v. San Antonio Express-News Corp.*, 590 S.W.2d 537, 539 (Tex. Ct. Civ. App. 1979).

These cases misunderstand *Gertz,* which was concerned primarily with supporting a distinction between liability standards for "public" persons on the one hand, and private figures on the other. The opinion does not purport to define who are and who are not public officials. In fact, as one noted commentator has explained, *Gertz* is "preeminently a 'public figure' case . . . ," B. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* 202 (1987); there was no serious claim that Elmer Gertz was a public official. Moreover, while analyzing one's access to the media makes some sense in determining public figure status, which is based largely on concepts of individ-

ual notoriety and public visibility, it is foreign to the public official analysis, which is predicated on notions of governmental power and responsibility, irrespective of the individual official's prominence. Thus, in the preeminent "public official" case, *Rosenblatt*, this Court was unconcerned with what access the plaintiff had to the media.

The focus of these lower courts on a person's access to the media unduly de-emphasizes the "compelling normative consideration" cited in *Gertz* that "[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs," which the Court admonished is "[m]ore important than the likelihood that private individuals will lack effective opportunities for rebuttal . . . ." 418 U.S. at 344. Indeed, *Gertz* made it quite clear that the access to the media inquiry was not intended to be applied on a case by case basis: "[e]ven if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345.

Beyond this, it seems that many lower courts have failed to recognize that there is a basic difference in the reasons underlying the rule governing public officials and the rule governing public figures. Of necessity many public officials, certainly those who have stood for election, also are public figures. But it is not the fact that these persons have sought the limelight, or have access to the media, or are visible to the populace that is of crucial importance in classifying them as "public officials"; rather, it is the fact

that these persons possess *power* over the lives of citizens. It is because of the possession of this power that the Court has recognized that such persons should be subject to comment by citizens, and that public expression of sincerely held beliefs about them in their exercise of that power should not be suppressed by fear of defamation suits.

Whether or not a given public school teacher enjoys any particular visibility is beside the point. It is in the school teacher that most of the citizens of this country first encounter the power of government, and it is because they are possessed of this power that public school teachers are public officials for purposes of comment about their ability and performance.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to the Supreme Court of Virginia.

Respectfully submitted

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APPENDIX

PRESENT: All the Justices

RICHMOND NEWSPAPERS, INC., et al

v. Record No. 840737 OPINION BY JUSTICE HENRY H. WHITING

October 30, 1987

VERNELLE M. LIPSCOMB

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Willard I. Walker, Judge

This action for defamation brought by a Richmond public school teacher, Vernelle M. Lipscomb (Lipscomb), against Richmond Newspapers, Inc. (the newspaper), a publisher, and its reporter, Charles E. Cox (Cox), arises out of the publication of a front-page article in the *Richmond Times-Dispatch*. The trial judge sustained a jury's award of $45,000 in punitive damages against Cox, but required a remittitur of $900,000 of a $1,000,000 compensatory damage award against both defendants. We will affirm the reduced award of compensatory damages but reverse the award of punitive damages.

I. ISSUES

(1) Was Lipscomb, as a public school teacher, in that class of public officials which can only recover compensatory damages for defamation by establishing the constitutional malice described in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964)?

(2) If not, was negligent publication by Cox and the newspaper subsumed in the jury's finding of a publication

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COUNSEL OF RECORD: Alexander Wellford (David C. Kohler; Christian, Barton, Epps, Brent & Chappell, on briefs), for appellant. John H. OBrion, Jr, (William Allcott; Carrie L. Camp; Browder, Russell, Morris & Butcher, on brief), for appellee.

with reckless disregard for the truth; and, if so, was the evidence in this case sufficient to support a finding of negligent publication?

(3) Was the evidence in his case sufficiently clear and convincing to support the jury's finding of publication by Cox with a reckless disregard for the truth, which Lipscomb must establish to recover punitive damages?

Collateral issues must also be resolved as to the admissibility of an expert's opinion on the standard of care, the obligation of a trial court to segregate potentially defamatory evidence from non-defamatory evidence in its instructions to the jury, and the size of the jury's verdict.

II. FACTS

The news article was in the Sunday newspaper a few weeks prior to the opening of school in the fall of 1981. The article identified Lipscomb by name and said that certain parents and their children:

> charge that a Thomas Jefferson High School teacher is disorganized, erratic, forgetful and unfair; that she returns graded papers weeks late and absents herself from the classroom for long periods; that she insists students stick to the rules, and flouts them herself. They say she demeans and humiliates students. The brighter they appear, the likelier they are to suffer at her hands, the parents protest.

One of Lipscomb's colleagues was quoted as saying that the teacher "might be out of her element in dealing with the students found in the honors course where most of the problems seem to have cropped up since the mid-1970's."

Dr. I. David Goldman, a physician and a teacher at the Medical College of Virginia and the father of one of Lipscomb's students, initiated The contact with Cox. Goldman

allegedly told Cox that the school's principal "has had enough complaints about Ms. Lipcomb's performance over the years to know that there was trouble."

Another parent, a minister, was quoted as saying that his son was:

> so unreasonably and harshly treated [that the parent] told both [the teacher] and her principal that she ought to be ousted from the classroom . . . [that] he remembers Ms. Lipscomb as 'totally unbending, [a woman] of no leeway, no compromises, . . . [she] was willing to 'settle for mediocrity' and conformity.' [The minister also was alleged to have] told the school superintendent . . .' she is not fair, that she is hurting these kids.' I told [the superintendent] 'I will do all I can to get rid of her. She is bad for this system, bad for these kids.'

The article referred to a third parent as "[s]ound[ing] a note heard often: that Ms. Lipscomb is inclined to react in ways the students regard as irrational or harsh when her facts, judgment or authority are questioned. 'I think she has a bias against bright kids. Maybe she's afraid of them.' " A fourth parent described her child as one "with a long record of good grades [who] hits Ms. Lipscomb's class and winds up with a 'D.' "

The article quoted a student as saying, "She [Ms. Lipscomb] was patronizing, she was late for class, and she was missing from class a third of the time. When she was present she was so disorganized that few if any of [my] classmates understood what was expected of them. She didn't teach, I really learned nothing . . . her verbal excesses . . . caused . . . pain, I cried in class, I cried outside her class." Another student was quoted as saying she was a victim of the teacher's harassment tactics, "[i]f I asked her a question, she would come back with something like, 'That's a stupid question.' " Dr. Goldman's daughter allegedly told the reporter that, "[Ms. Lipscomb] seemed to

hate what I represented, meaning middle-class, bright, articulate, assertive, questioning. . . . I questioned her grades, I questioned her before the others in the class. She really didn't like it [and] she was always chipping away at our self-confidence."

A final student quoted said that the teacher's:

> verbal excess made me bawl right there is class, not once but twice. [Lipscomb's] students in the past year were always unsettled about what she would do next. She is just not a teacher. She would assign a test and we'd sit up half the night studying. When we got there in the morning, she'd say we won't take it. No reason. Or she'd just forget assigning us a test. She lost papers we turned in. She's totally unfitted to be in that class.

The negative comments essentially were repeated in the trial testimony of the individuals quoted. On the other hand, a number of students, teachers, and school administrators contradicted those complaints.

Cox essentially confined his investigative activities to interviews with the complaining parents and students and to telephone conferences with Lipscomb's principal and two of Lipscomb's teaching colleagues. He obtained very little information from Lipscomb and the other school employees. The school board's attorney had advised Lipscomb and certain school administrative officials not to discuss the details of the Goldman complaints because of the law dealing with confidentiality of both student and individual teacher records and his fear of litigation over the Goldman issue with Lipscomb as a possible defendant.

III. WHETHER LIPSCOMB WAS A NEW YORK TIMES "PUBLIC OFFICIAL"

We first consider whether the Trial court correctly required Lipscomb to prove publication with a reckless dis-

regard for the truth in her claim for compensatory damages. The answer to this question hinges upon whether the trial court properly classified Lipscomb as a "public official" under the *New York Times* malice rule.

New York Times prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. "Actual malice" as described in *New York Times* might be confused with common law malice, which involves "motives of personal spite, or ill-will," *The Gazette* v. *Harris,* 229 Va. 1, 18, 325 S.E.2d 713, 727, *cert. denied sub nom., Fleming* v. *Moore,* 472 U.S. 1032 (1985); *Story* v. *Newspapers, Inc.,* 202 Va. 588, 590, 118 S.E.2d 668, 670 (1961). Therefore, we will refer to such actual malice as *"New York Times"'* malice.

The Supreme Court said in *New York Times* v. *Sullivan* "[w]e have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule." 376 U.S. at 283 n.23. In *Hutchinson* v. *Proximire,* 443 U.S. 111, 119 n.8 (1979), the Supreme Court pointed out that it "has not provided precise boundaries for The category of 'public official'; it cannot be though to include all public employees, however." Nevertheless, that Court has left little doubt that other courts are to determine who is a "public official" in accordance with "the purposes of a national constitutional protection," *Rosenblatt* v. *Baer,* 383 U.S. 75, 84 (1966), and not by reference to state law standards.

The following United States Supreme Court cases give some guidance. In *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), the Supreme Court observed that:

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the

> lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials . . . usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Id. at 344 (footnote omitted). The *Gertz* Court accorded private person status to an attorney who was not on the public payroll. *Id.* at 352. Although Lipscomb was on the public payroll, we believe attorneys have significantly more access than teachers to the media and a more realistic opportunity to answer false charges about their competence. We must also keep in mind that Lipscomb probably could not have answered these charges fully without disclosing other student's names and records in violation of Code 522.14287 (1980).[1]

Gertz also noted that "[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." 418 U.S. at 344. However, that is only one of the many matters a court must weigh in deciding whether a particular public employee is one classified as a "public official" under the *New York Times* malice rule.[2]

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[1] Code § 22.1-287 provides in pertinent part:

> No teacher, principal or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school in any process . . . .

This provision is subject to a number of exceptions not applicable here.

[2] We quoted *Gertz* in support of our finding that a college professor on the state payroll was not a public figure in *Fleming* v. *Moore*, 221

Other United States Supreme Court cases give further guidance by identifying and weighing the conflicting interest to be served. *Rosenblatt* suggested:

> The motivating force for the decision in *New York Times* was twofold . . . first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues . . . [I]t is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.
>
> Where a position in government has such apparent importance that the public has an independent interest in the qualifications and importance of the person who holds it, beyond the general public interest in the qualifications and importance of all government employees, both elements we identified in *New York Times* are present. . . .

383 U.S. at 85-6.

Cases construing the "public official" standards of *New York Times* are legion, but we have found no federal cases concerning school teachers. The state defamation cases are split on the issue of whether public school teachers are "public officials" subject to the *New York Times* malice rule.[3]

Va. 884, 891-92, 275 S.E.2d 632, 637 (1982), *cert. denied*, 472 U.S. 1032 (1985). However, different considerations determine whether a person is a "public figure" or a "public official" under the *New York Times* malice rule.

[3] The following cases lend support to the proposition that a public school teacher is a *New York times* "public official." *See Sewell* v. *Brookbank*, 119 Ariz. 422, 425, 581 P.2d 267, 270 (1978); *Gallman* v.

There has been no showing that Lipscomb, who was not an elected official, either influenced or even appeared to influence or control any public affairs or school policy. On the contrary, the evidence shows her to have limited her activities to teaching and acting as a temporary department head of a small number of other English teachers. We also note there was no criticism of Lipscomb as an acting department head—it is all leveled at her teaching activities.

Although the article purports to raise the general question of what redress parents of a public school student may have when faced with an allegedly incompetent teacher, it named only one allegedly incompetent teacher and charged specific instances of that teacher's incompetence. Redress through the school system was available to the parents to question individual teacher competence. When Cox and the newspaper chose to assist Dr. Goldman in going beyond his normal remedy by publicizing his dispute, they became subject to the same duty of due care to ascertain the accuracy of their charges that every citizen must assume when issuing statements, the substance of which makes substantial danger to reputation apparent.

Carnes, 254 Ark. 987, 992, 497 S.W.2d 47, 50 (1973); *Basarich* v. *Rodeghero*, 24 Ill. App. 3d 889, 893, 321 N.E.2d 739, 742 (1974); *Luper* v. *Black Dispatch Publishing Company*, 675 p.2d 1028, 1030-31 (Okla. 1983); *Johnston* v. *Corinthian Television Corp.*, 583 p.2d 1101. 1103 (Okla. 1978). On the other hand, the following cases suggest that public school teachers are not *New York Times* "public officials." *Franklin* v. *Lodge 1108, Benevolent and Protective Order of Elks*, 97 Cal. App. 3d 915, 922-24, 159 Cal. Rptr. 131, 136-37 (1979); *Nodar* v. *Galbreath*, 462 So.2d 803, 808 (Fla. 1984); *McCutcheon* v. *Moran*, 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133 (1981); *Johnson* v. *Board of Junior College Dist. No. 508*, 31 Ill. App. 3d 270, 276l n.1, 334 N.E.2d 442, 447 n.1 (1975); *True* v. *Ladner*, 513 A.2d 257, 263-64 (Mo. 1986); *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 297, 473 N.E.2d 1191, 1195 (1984), *cert. denied, Lorain Journal Co.* v. *Milkovich*, _____ U.S. _____, 106 S.Ct. 322, *overruled, Scott* v. *News-Herald*, 25 Ohio St.3d 243, 296 N.E.2d 699 (1986); *Poe* v. *San Antonio Express News Corp.*, 590 S.W.2d 537, 640 (Tex. Civ. App. 1979).

The same reasoning applies to the defendants' contention that because the school system did not respond to Dr. Goldman's satisfaction, the conflict escalated into a public issue of evaluation of teacher competence in general and accountability of the school administration to the parents and students in particular. As *Rosenblatt* points out, "[t]he employee's *position* must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 U.S. at 86; n.13 (emphasis added).

We find that the public had no independent interest in Lipscomb's qualifications and performance "beyond its general interest in the qualifications and performance of all government employees," and, therefore, conclude that Lipscomb was not a "public official" under *New York Times* but a private person. Accordingly, we decide that the trial court erred in requiring Lipscomb to prove *New York Times* malice before she could recover compensatory damages.

IV. NEGLIGENT PUBLICATION

Because the jury found the plaintiff established *New York Times* malice, we must next consider whether we properly may enter a judgment for Lipscomb for compensatory damages or whether the case should be remanded for a new trial on that issue. Upon our request, the parties addressed that question in supplemental briefs filed subsequent to oral argument of the appeal. Two factors influence this determination; first, is a finding of negligence subsumed in a jury's finding of a reckless disregard for the truth? Second, if so, is the evidence sufficient to support a finding that Cox's investigation was negligent?

We described recklessness as a high degree of negligence in *Griffin v. Shively,* 227 Va. 317, 321, 315 S.E.2d 210, 212 (1984). As *White v. Center,* 218 Iowa 1027, 1037,

254 N.W. 90, 95 (1934), expresses it, "[o]ne who is guilty of negligence may not be guilty of recklessness, but one who is guilty of recklessness is also guilty of negligence".

We have said, in discussing the survival of common-law qualified privileges in Virginia, that the negligence standard is subsumed in the higher standard of common-law malice. *The Gazette*, 229 Va. at 18, 325 S.E.2d at 724. And in *Great Coastal Express, Inc. V. Ellington*, 230 Va. 142, 152, 334 S.E.2d 856, 853 (1985), we found that the trial court improperly imposed the higher standard of *New York Times* malice upon a private person seeking to recover compensatory damages for defamation. In *Great Coastal Express*, we conclude the higher standard of *New York Times* malice subsumed the required negligence standard and held the lack of a negligence instruction was harmless.

This jury found that Cox acted with reckless disregard for the truth. The jury, and not the court, determines the factual issues of negligence. Therefore, if we find the evidence is sufficient to create a factual issue of Cox's negligence, we will apply the rationale of *Great Coastal Express* to this case.

Because the trial court did not submit the issue of negligent defamation to the jury, it did not make the required preliminary inquiry of whether "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " *See The Gazette*, 229 Va. at 11, 325 S.E.2d at 722. We do so now from the record as we did in *The Gazette*, 229 Va. at 28, 325 S.E.2d at 733. In this case the inquiry needs little discussion. All parties, including Cox and his editors, recognized a substantial danger of injury to Lipscomb's reputation, raising a duty to investigate the accuracy of the statements made to Cox.

A number of supervisors, a fellow teacher, and students, including some classmates of the complaining students, testified as to Lipscomb's good qualities as a teacher and

contradicted virtually all the negative statements made by the persons Cox interviewed. The students who contradicted the negative testimony were all shown to have been readily available for interview in the Richmond area. While the school authorities would not furnish Cox with the names or addresses of other students in Lipscomb's classes, the jury could have inferred from the evidence that Cox could have obtained this information from the students he interviewed but negligently failed to do so. In fact, one student gave Cox the names of some of the other students, but Cox apparently did nothing with the information.

We find that the jury had ample evidence from which to conclude that a reasonably prudent news reporter writing this article could readily have contacted a number of other students to verify (or contradict) these accusations and should have done so. Moreover, because there is no issue as to Cox's agency, the newspaper company also is liable for his negligent performance under familiar principles of *respondent superior*.

V. SUFFICIENCY OF THE EVIDENCE TO SHOW NEW YORK TIMES MALICE

The jury awarded punitive damages against Cox. To sustain that award, Lipscomb, as a private person, is required to establish *New York Times* malice by clear and convincing proof. *Newspaper Publishing Corp.* v. *Burke*, 216 Va. 800, 804, 224 S.E.2d 132, 136 (1976). To decide if that requirement has been met, we conduct an "independent examination of the whole record," *The Gazette*, 229 Va. at 19, 325 S.E.2d at 727, resolving disputed factual issues and inferences favorably to the plaintiff. Lipscomb maintains that Cox's reckless disregard for the truth is demonstrated by a consideration of the following six factors:[4]

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[4] We express no opinion on the appropriateness of Lipscomb's six factors as tests for determining the presence of *New York Times* malice.

(1) Lipscomb says that the ill will Cox's sources bore Lipscomb was of such a character as to raise obvious doubts as to their veracity. A review of the five cases Lipscomb cites in support of this contention demonstrates the insufficiencies of this argument.

The Supreme Court in *St. Amant* v. *Thompson*, 390 U.S. 727 (1986), suggested that "recklessness may be found where there are obvious reasons to doubt the veracity of the information or the accuracy of his reports." *Id.* at 732. However, the Court in *St. Amant* concluded that, "[f]ailure to investigate does not in itself establish bad faith . . . [c]loser to the mark are considerations of [the informant's] reliability." *Id.* at 733. The Supreme Court then found against the claimant in *St. Amant* since there was no evidence of the informant's bad reputation for veracity.

In each of the remaining cases cited by Lipscomb, the reporter either had personal doubts about the informant or had been told that the informant was unreliable. *Pep* v. *Newsweek, Inc.*, 553 F.Supp. 1000, 1002 (S.D.N.Y. 1983); *Alioto* v. *Cowles Communications, Inc.*, 430 F.Supp. 1363, 1370-71 (N.D.Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Burns* v. *McGraw-Hill Broadcasting Company, Inc.*, 659 P.2d 1351, 1361-62 (Colo. 1983); *Stevens* v. *Sun Publishing Co.*, 270 S.C. 65, 71, 240 S.E.2d 812, 815, *cert. denied*, 436 U.S. 945 (1978).

Lipscomb cites no other United States Supreme Court cases that directly address the issue of ill will or bias affecting credibility. However, the case of *Hotchner* v. *castillo-Puche*, 551 F.2d 910, *cert. denied sub nom., Hotchner* v. *Doubleday & Co., Inc.*, 434 U.S. 834 (1977), held that proof of ill will or bias on the part of an informant is not sufficient in itself to impute knowledge of probable falsity of the information. Another *New York Times* malice case, after reciting the obvious bias of the informants, including the ex-wife of the defamed plaintiff and the ex-husband of his present wife, concluded that this did not automat-

ically disqualify them as legitimate sources of information. *Loeb* v. *New York Times Communication Corp.*, 497 F.Supp. 85, 92-93 n.12 (S.D.N.Y. 1980).

Except for the bias suggested by their expressions of dissatisfaction with Lipscomb, there is nothing to impeach the credibility of the professor of medicine, the minister, the Richmond school teacher, and the state health department employee, who were the complaining parents, or of their four complaining children. We conclude that there was insufficient damaging evidence about the informants themselves to provide obvious reasons to doubt their veracity.

(2) Lipscomb claims Cox's testimony demonstrates a predetermination of the facts. The most persuasive testimony we can find to support this assertion is Cox's testimony that when Dr. Goldman first called him:

> He said that he had a story he wanted to talk to me about. And he told me in general about the thing .... He indicated enough to pique my interest about the thing .... [H]e had considerable documentation to present in this case, an extraordinary amount, obviously of documentation already built up in this case. There was a record there for the picking up. In other words .... [h]e said that he thought it had a wide public interest. I thought so myself. I was impressed [by the long document Dr. Goldman had written the school board] and I made a lot of marks on this thing .... I'm cautious by nature and I considered this document and I considered Dr. Goldman rather carefully. I was interested in the story. I had been thinking about such a story for a long time.

Curtis Publishing Co. v. *Butts*, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring), and *Corabi* v. *Curtis Publishing Co.*, 441 Pa. 432, 466 n.20, 273 A.2d 899, 916 n. 20 (1971), relied upon by Lipscomb, described "programs" conducted by the publishers to arouse people. The *Butts* case con-

tained evidence of "an editorial decision . . . to 'change the image' of the [magazine beginning with] an announcement that the magazine would embark upon a program of 'sophisticated muckraking,' designed to 'provoke people, make them mad.' " 388 U.S. at 169. The evidence in this case discloses no such program conducted by the defendants; it is essentially limited to a criticism of their handling of this particular article.

Lipscomb refers to three cases in support of her claim that Cox had "predetermined the facts" when he began writing the story and suppressed favorable evidence to achieve that end. A review of the facts in those cases illustrates the failure of Lipscomb's proof on this point.

In *Gertz* v. *Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983),[5] the court said:

> In summary, [the editor] conceived of a story line; solicited . . . a writer with a known and unreasonable propensity to label persons or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory *per se* of [the plaintiff], and in fact added further defamatory material based on [the writer's] 'facts.'

In *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir.), *cert. denied*, 396 U.S. 1049, (1969), the reporter, before beginning any research, solicited comments from Walter Reuther about Senator Goldwater, who had recently won the Republican nomination for the presidency. The solicitation stated in part:

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[5] This case was on appeal from The trial court to which it had been remanded by the earlier decision of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

> 'I'm writing an article for [the magazine] about an old enemy of yours—Barry Goldwater. It's going to be a psychological profile, and will say, basically, that Goldwater is so belligerent, suspicious, hot-tempered, and rigid because he has deep-seated doubts about his masculinity.'

414 F.2d at 329.

In *Airlie Foundation, Inc.* v. *Evening Star Newspaper Co.*, 337 F.Supp. 421 (D.C. Cir. 1972), the reporter who wrote the defamatory story from a press release of defamatory information added his own defamatory information, also determined to be false. The evidence in this case falls far short of that necessary to establish the "predetermination of the facts" referred to in these cases.

(3) Lipscomb argues that Cox not only resolved ambiguities in the story against her but actually omitted information that was favorable. Cox did fail to report that a substantial part of Lipscomb's extended absence from class was due to the death of her finance, resulting in a leave of absence, which Lipscomb characterizes as a "brutal twisting of known facts." The omission of this favorable explanation for her absence may have been unfair, but we do not agree that it sufficiently evidenced either the "brutal twisting" claimed or a reckless disregard for the truth.

Lipscomb further accuses Cox of "consistently refusing to include [favorable] information which contradicted the predetermined thesis of the article." She refers only to the information Cox received from her school principal, the school board attorney, and two fellow teachers concerning her excellent qualities as a teacher and her "unblemished record," and then charges that "[yet] nowhere in the article do these quotes appear."

Examination of the record reveals *no* testimony from the school principal that he told Cox that Lipscomb was an "excellent teacher with an unblemished record," as

scomb claims in her brief, but we note that Cox quoted him in the article as saying that she "was so highly thought of that she was promoted to department head in the past year." The school board's attorney told Cox, "There were people I had talked to that thought she was a good teacher"; the article says "school authorities assert that she is a good teacher."

One of Lipscomb's colleagues testified that she told Cox that Lipscomb was "a good teacher of grammar" and "I thought she was a good teacher" and perhaps she also said that Lipscomb "was a strict disciplinarian." Another teacher was quoted as telling Cox that Lipscomb was a "good teacher of grammar," but this teacher did not testify. The only omission we find is the failure to attribute the appraisal of Lipscomb "as a good teacher" to her fellow teachers, but that laudatory comment could be considered as having come "from school authorities."

Our review of the evidence convinces us that there is insufficient support for this claim.

(4) Lipscomb contends that the absence of deadline pressure "holds a libel defendant more accountable." While the cases cited by the plaintiff indicate that lack of a deadline is a factor to be considered, in each case there also was other evidence of conduct demonstrating a reckless disregard for truth. *See Butts,* 388 U.S. at 157; *Carson* v. *Allied News Co.,* 529 F.2d 206, 211 (7th Cir. 1976); *Goldwater,* 414 F.2d at 339; *Burns,* 659 P.2d at 1362 (Colo. 1983); *Mahnke* v. *Northwest Publications,* 280 Minn. 328, 340, 160 N.W.2d 1, 12 (1968).

The facts in all those cases give rise to an inference of recklessness in failing to check other sources, apart from deadline pressures. Lipscomb cites no cases, however. where absence of deadline pressure, coupled with a biased source, was sufficient to establish *New York Times* malice.

Indeed, *Tavoulareas* v. *Piro,* 817 F.2d 762, 797 (D.C. Cir. 1971), is to the contrary: "[T]he absence of deadline

pressure is probative of nothing," supporting that statement with this footnote: "Absence of deadline pressure has been found relevant in actual malice inquiries only to negate defendants' excuses for inadequate investigation of their stories .... No such situation is presented here." 817 F.2d at 797 n. 52 (citation omitted). Notably, the *Tavoulareas* informant was a biased source—the plaintiff's estranged son-in-law. If the evidence available to Cox at the time of writing was legally insufficient to require a further investigation before publication, additional time to do such an investigation has no legal significance.

(5) Doubts of the newspaper staff members as to the accuracy of the story were said to be evidenced by their delay in publishing it until Cox returned from a vacation. Cox testified that upon his return his editors had fears and reservations because "[t]hey just wanted to be careful journalists. They wanted to be very, very sure of the sources on this ... they wanted their hands held, to be reassured I had done all my work, as an employee, and I was able to tell them, I assume convincingly, that I had done my work, [they] wanted to be sure that what [I] had gotten was accurate and the sources were reliable." This is hardly "sufficient evidence to permit the conclusion that [either of] the defendant[s] in fact entertained serious [doubt] as to the truth of his publication." *St. Amant,* 391 U.S. at 731; *cf. Tavoulareas,* 817 F.2d at 793-94 (an editor's statement, "[i]t's impossible to believe" that the plaintiff set up his son in business in derogation of his fiduciary duty, coupled with a biased source, may have sufficed to show a reckless disregard for the truth if it had referred to a false statement; however, the court found the statement was essentially true).

(6) The evidence is insufficient to support Lipscomb's final charge that Cox threatened and intimidated her, the school board's attorney, and the principal, the only favorable sources cited by her. On the contrary, the evidence

shows that Cox was trying to persuade them to give Lipscomb's side of the controversy.

The school board's attorney testified that Cox told him if "the school system did not make a formal response to this situation, that the article was going to be written and it was going to not look good for the school system or Ms. Lipscomb .... he was going to write a story and it was not going to reflect on the school system or Ms. Lipscomb because the implication was the School Board would not respond to that."

Lipscomb, when asked if Cox had said, "You really ought to respond to the charges or words to that effect" replied, "Words to that effect, but it was more or less like an intimidating thing, like 'you'd better talk to me.' He didn't say, 'You ought to talk to me.' It was more or less an intimidation thing ... I just could detect something like a threat in his voice." Cox himself said, "I tried, I tried very hard to tell [Lipscomb] that these were serious charges. And it seemed to me that she ought to respond."

The school principal testified that when he refused to give his views about Lipscomb in connection with the Goldman complaints, Cox "indicated the article would be written with or without my comments, which didn't set too well with me either. . .he was going to write it with or without my input. He was trying to get my side along with whatever information he had."

We conclude that, even with he bias shown, no one of the six elements charged is legally sufficient to justify a jury's finding of a reckless disregard for the truth. We equally are convinced that a consideration of all these elements as a group demonstrates the same inadequacy. Although we are satisfied that the evidence was sufficient to create a factual issue of negligence, as stated above, we find it insufficient to establish *New York Times* malice by clear and convincing evidence. Accordingly, we will reverse the award of punitive damages against Cox.

Lipscomb assigned cross-error to the trial court's refusal to submit the issue of the newspaper's liability for punitive damages to the jury. We need not decide that issue in view of the preceding discussion.

VI. ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

The defendants contend that the trial court erred in excluding evidence from an expert witness, a nationally known journalist, proffered on the standards for investigative reporting. The excluded evidence was an opinion that Cox:

> followed the precepts of fair play and accuracy throughout this and did all of the things that a person should do, that is he took the accusation against the public figure and the public institutions and pursued them to obtain documentation and to also go to the individuals involved and give them every opportunity to explain their side of the accusations [and therefore did not depart] from the standards of journalism relating to investigative reporting.

The standards were described by the witness as:

> developed over a period of years and involve basic accuracy and fairness in articles and the mechanical procedures that will result in accuracy and fair play for all of the people in the stories.
>
> From that standpoint what one usually starts with is a brief accusation or criticism of a public official, and then you try to make a determination whether there is corroboration for that, use of public records, the use of a wide range of other devices and, in the end, go to those who will be criticized and ask those individuals what their response is to the criticism.

We conclude that the trial court did not err in excluding this evidence for a number of reasons.

First, the issue before the jury was a simple one, essentially whether Cox should have conducted further interviews with other students and parents to meet the standard of due care and to avoid acting with reckless disregard for the truth. *Coppola* v. *Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980), states that the rule:

> [E]xpert testimony concerning matters of common knowledge or matters as to which the jury are as competent to form an opinion as the witness is inadmissible. Where the facts and circumstances shown in evidence are such that men of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom, the opinion of an expert based upon such facts and circumstances is inadmissible.

Id. at 2562, 257 S.E.2d at 803-04. An annotation on this subject includes the three cases cited by the defendants. Annot. 37 A.,L.R.4th 987 (1985). It suffices to say that many more cases discussed in this annotation reach the contrary conclusion. In virtually all these cases the issue turned on how much investigation the reporter should have made before publishing a statement which subsequently turned out to be false, and most of the courts held that a jury was just as capable as an expert of deciding whether the reporter was negligent in failing to make further inquiry. We find that a jury in this state is as competent as any expert to form an intelligent and accurate opinion as to whether a reporter should have conducted additional investigations.

Second, the defense proffered this evidence in an effort to establish a "journalistic malpractice test." We think the adoption of a "journalistic malpractice test" would be inappropriate for a number of reasons:

(a) While responsible newspapers serve many worthwhile objectives, profit is an important consideration. Star-

tling, sensational stories tend to sell more newspapers than dull, factual stories. Thus, there is an inherent conflict of interest when a journalist is required to draw inferences from news items. It seems imprudent to permit media experts to set a standard under these circumstances.

(b) The evidence here does not establish that journalists are required to have special education for their profession,[6] as engineers, doctors, lawyers, or certified public accountants must, nor have they acquired knowledge, training, and experience unique to certain trades focusing upon scientific matters, such as electricity, blasting and the like, which a jury could not understand without expert assistance.

(c) The adoption of such a standard might mean that there could be no recovery unless a media expert testified that the conduct did not meet the standard of care in the journalistic community. *See Martin*, 549 P.2d at 92. We decline to impose such a requirement.

VII. SEGREGATION OF POTENTIALLY DEFAMATORY MATERIAL FROM MATERIAL OBVIOUSLY NOT DEFAMATORY

Both parties agreed that the jury should see the entire article to determine the context of the particular defamatory statements. However, Cox contends the court should have winnowed out obviously non-defamatory material in its instructions to the jury.

There are two independent reasons why we find this contention has no merit:

(1) We assume the jury followed the trial court's instructions limiting Lipscomb's right of recovery to defam-

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[6] We note that Cox admitted he took no undergraduate courses in journalism. He received his college degree in economics.

atory statements of fact.[7] The article contained not only potentially defamatory statements but also statements of opinions, laden with factual content.[8] It was the jury's function to determine which statements were defamatory statements of fact about Lipscomb, Taking into consideration the entire background of the case and the context in which those statements were made. *See Zayre, Inc. v. Gowdy,* 207 Va. 47, 50, 147 S.E.2d 710, 713 (1966); *Powell v. Young,* 151 Va. 985, 994, 144 S.E. 624, 626 (1928).

(2) There is no duty upon a trial court to segregate potentially defamatory from non-defamatory material in granting instructions to the jury. *See Harvey* v. *Epes,* 53 Va. (12 Gratt.) 153, 184 (1855). In *Harvey* a general motion was made to exclude all parol evidence tending to alter, vary, explain, or add to a written contract between the parties but the trial court refused to do so. On appeal, this Court said:

> [s]ome of the parol evidence was certainly admissible, and therefore it would have been improper to have excluded all. It would have been just as improper to have instructed the jury in general terms to disregard

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[7] No party tendered an instruction informing the jury that it could not award damages for expressions of opinion nor were instructions tendered setting forth how statements of opinion could be distinguished from statements of fact.

[8] Many of the potentially defamatory statements about Lipscomb were intermingled with what were arguably statements of opinion. However, the jury could consider those opinions as "laden with factual content." *See Ollman v. Evans,* 750 F.2d 970, 982 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1127 (1985); *cf. Chaves v. Johnson,* 230 Va. 112, 118-19, 335 S.E.2d 97, 101-02 (1985). It is this feature which distinguishes this case from *Ollman* and *Chaves.* In *Ollman* the majority found the article was confined to statements of opinion that primarily depicted Ollman as a political activist and questioned his intentions as a potential head of a political science department of a college. 750 F.2d at 990-91. Similarly, in *Chaves* one architect merely characterized a competing architect as inexperienced and as charging excessive fees. 230 Va. at 118-19, 335 S.E.2d at 101.

> all parol evidence tending to alter, vary, explain or add to the written contracts mentioned in the said bill of exceptions. Nor was the court bound to sift the mass of evidence in the case, and determine which would alter, vary, explain or add to the written contracts, and which would not. It was the duty of the parties moving the instruction to point out the particular evidence objected to; and not having done so, the court, on that ground, was justifiable[*sic*] in refusing to give the instruction.

Id.

VIII. ALLEGED EXCESSIVE DAMAGES

The defendants charge that the verdict for $1,000,000 in compensatory damages and $45,000 in punitive damages was the result of "passion, prejudice, or a misconception of the law" and that the verdict, therefore, should have been set aside in its entirety.

First, they argue that racial prejudice influenced the size of the verdict. Before the trial began, the trial court recognized that racial considerations *might* influence the outcome. However, after the trial ended, the court found that those considerations had not influenced the outcome, made a written finding that the jury had shown no "bias or improper motive in making its decision", and refused to set aside the compensatory damage verdict on that ground. Our review of the record demonstrates that the trial court did not abuse its discretion in making this finding.

Second, the defendants contend that the size of the verdict establishes that prejudice, passion, or a misconception of the law influenced both the amount awarded and the jury's determination of liability. While we have found the evidence insufficient to show a reckless disregard for the truth by Cox, it is more than ample to justify a finding

of negligence in his failure to interview other students and school officials before publishing manifestly damaging statements about Lipscomb. Additionally, the trial court failed to find those factors which might indicate that an excessive damage award tainted the finding of liability.

This case is unlike *Rutherford* v. *Zearfoss*, 221 Va. 685, 272 S.E. 2d 225 (1980), where the trial court expressly found that sympathy for the plaintiff influenced the finding of liability in a medical malpractice claim. Nor is this case like *Rome* v. *Kelly Springfield Tire Co.*, 217 Va. 943, 948, 234 S.E.2d 277, 281 (1977), where there was no clear preponderance of the evidence in favor of either party and the damage award was in the exact amount of the lost wages and medical expenses despite the plaintiff's serious and permanent injuries, suggesting that doubt about the liability issue materially influenced the jury.

The defendants cite *Ford Motor Co.* v. *Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982), but the decision actually supports the action taken by the trial court in this case. There, the jury returned a plaintiff's verdict for $50,000. The defendant moved the trial court to set the verdict aside and order a new trial on all issues, contending that the verdict was so excessive as to demonstrate the jury had misunderstood the facts and the law. The court refused to set the verdict aside, holding "there is no reason to conclude that an excessive damage award tainted the legitimacy of the jury's finding on liability." *Id.* at 434-35, 297 S.E.2d at 682. The court did order the plaintiff to remit $33,500 of the award, to which action the plaintiff assigned cross-error. We affirmed across the board. We cannot find in the present case that the trial court abused its discretion in concluding that the jury's finding of liability was not tainted by the excessive award of damages.

The defendants also complain that the size of the final awards—$100,000 in compensatory damages and $45,000

in punitive damages—was "so out of proportion to the damage sustained as to be excessive as a matter of law." We need not consider further the punitive damage award since we have set it aside.

Cox compares this case to *The Gazette* where we set aside a jury's award of $100,000 for compensatory damages for defamation, finding it to be excessive as a matter of law. 229 Va. at 48, 325 S.E.2d at 745. Unlike the defamed plaintiff in *The Gazette*, Lipscomb was substantially and adversely affected by this defamatory publication.

The minister in her church said that she was "totally destroyed and distraught, was withdrawn and afraid . . . she was not the self-confident and assured . . . person she had been." He also said, "She has found it difficult to even attend the worship services let alone participate in the church services [as she formerly did]." Her supervisor at work says she has changed from a "proud, confident person" to one who avoids crowds, does not mingle with people, "has like crawled into a little shell, lost faith in almost anything and everything."

Lipscomb herself said she was unable to read the article without crying, she felt her whole career and life had been destroyed. Lipscomb says she now is very ill at ease in crowds, never knows what people are thinking, and forever live[s] in fear when I go to school and in the classroom that another Dr. Goldman . . . will crop up and flash that article in my face." We find that a jury could infer substantial emotional injury from this evidence.

We must necessarily accord the trial court a large measure of discretion in remitting excessive verdicts[9] because it saw and heard the witnesses while we are confined to

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[9] We are not required to make an independent review of the award of compensatory damages in this defamation case. *The Gazette*, 229 Va. at 20, 325 S.E.2d at 728.

the printed record. *Bassett Furniture* v. *McReynolds*, 216 Va. 897, 912-13, 224 S.E.2d 323, 332-33 (1975). We do not find from this record that the trial judge plainly abused his discretion in setting aside the award of $1,000,000 in compensatory damages or in imposing a remittitur of $900,000 in that verdict. He carefully reviewed the evidence in a written opinion, considering "factors in evidence relevant to a reasoned evaluation of the damages incurred," *id.* , 912, 224 S.E.2d at 332, and we will not disturb that finding because "the recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence." *Id.*

Lipscomb assigns cross-error to the reduction. We believe an award of $1,000,000 clearly would have been excessive. However, the evidence does not demonstrate that the trial court abused its discretion in reducing the award to $100,000.

For the reasons assigned, we will affirm the judgment of $100,000 for compensatory damages against both defendants, will reverse the judgment of $45,000 for punitive damages against Cox, and will enter a final judgment of $100,000 against both defendants.

Affirmed in part,
reversed in part,
and final judgment.

Stephenson, J., with whom Thomas, J., joins, concurring in part and dissenting in part.

RICHMOND NEWSPAPERS, INC., ET AL.

v. Record No. 840737

VERNELLE M. LIPSCOMB

Stephenson, J., concurring in part and dissenting in part.

I concur with the majority's holdings that (1) Lipscomb was not a public official, (2) punitive damages should be denied because the evidence is insufficient to support the jury's finding that Cox acted with "reckless disregard for the truth," and (3) the trial court properly excluded expect testimony.* However, I disagree with the majority's decision to enter final judgment in favor of Lipscomb on the basis of negligence. In my opinion, the majority's ruling on this point is logically flawed.

The majority relies upon *Great Coastal Express* v. *Ellington*, 230 Va. 142 324 S.E.2d 846 (1985), as authority for the proposition that a finding of negligence is subsumed in a finding of reckless disregard for the truth. At trial, the plaintiff in *Great Coastal* was required to prove *New York Times* malice. On appeal, however, we held that the appropriate standard was negligence. We then pointed out that because plaintiff had *successfully proved* the higher standard, he had necessarily proved negligence. *Great Coastal* therefore is authority for the proposition that if a plaintiff proves reckless disregard for the truth, he also proves negligence.

Great Coastal cannot serve as authority for the majority's decision in this case, however, because Lipscomb *did*

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*I also agree that the trial court properly submitted the entire article to the jury because the statements of opinion contained in the article were "laden with factual content," *Ollman* v. *Evans*, 750 F.2d 970, 982 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). I would make clear, however, that "[i]t is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion." *Chaves* v. *Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985).

not successfully prove reckless disregard for the truth. It is one thing to say that proof of a higher standard includes proof of a lower standard. It is quite another thing to say that failure to prove a higher standard includes proof of a lower standard.

Once the majority decided that Lipscomb failed to prove reckless disregard for the truth, the jury's verdict became null and void. Nevertheless, the majority seizes upon this void verdict as a the predicate for ruling, as a matter of law, that negligence was proved. In my opinion, the majority has invaded the province of the jury.

In a case of this complexity, we should permit a properly instructed jury to decide the issue of negligence. Accordingly, I would remand the case for a new trial.

Thomas, J., joins, concurring in part and dissenting in part.

RULING OF CIRCUIT COURT OF CITY OF RICHMOND GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGEMENT

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND DIVISION I

VERNELL M. LIPSCOMB, *Plaintiff*	) Case No.LF-1112)
v.	)
RICHMOND NEWSPAPERS, INC., and CHARLES E. COX,	)))
Defendants	)

TRANSCRIPT OF PROCEEDINGS HELD BEFORE THE HONORABLE WILLARD I. WALKER, JUDGE

July 18, 1983

Richmond, Virginia

Appearances:

BROWDER, RUSSELL, MORRIS AND BUTCHER
By: JOHN H. OBRION, JR., ESQUIRE
KENNETH XAVIER WARREN, ESQUIRE
KERI CAMP
attorneys, of counsel for plaintiff

CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL

By ALEXANDER WELLFORD,
ESQUIRE
DAVID C. KOHLER, ESQUIRE
attorneys, of counsel for defendants

• • • •

THE COURT: Well, counsel, I am going to rule on this, then we are going to have time for you all to get a cup of coffee and see what the agenda will be for the rest of the time we will have.

And I am going to rule that a school teacher, that the plaintiff in this case, and because she is a school teacher, that the plaintiff in this case, and because she is a school teacher, not because she is a department head, although I recognize that as the case, is a public official. And, therefore, that the requirement should be the New York Times standard, particularly, as a media defendant. I don't know that it makes any difference.

I am also going to rely on the Sanders case that the Supreme Court of Virginia meant to apply the constitutional malice standard to areas involving public or general concern, and that freed of the restraints or restrictions of the Rosenbloom v. Metromedia, Inc., they would nonetheless apply the same standard there as they would to public officials and public figures. And this is a public or general concern area by virtue of Sanders.

We don't know that the Supreme Court would do that, however, I believe that it would. So on two bases I would find this to be a case where constitutional malice must be shown.

We will take a brief recess now.

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

CASE NO LF-1112

Vernelle M. Lipscomb,

Plaintiff,

v.

Richmond Newspapers, Inc.
and
Charles E. Cox,

Defendants.

MOTION FOR PARTIAL SUMMARY JUDGEMENT

Pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, defendants move the Court for an Order that plaintiff shall be required to prove, by clear and convincing evidence, that the August 16, 1981, article entitled "Questions About Teachers Hard To Pursue", which is the subject of this action, was published by defendants with knowledge that it was false or in reckless disregard of the truth. As grounds for this motion, defendants state:

1. Plaintiff is a public official.

2. The August 16, 1981, article that is the subject of this action reports on a matter of public or general concern.

RICHMOND NEWSPAPERS, INC.
and CHARLES E. COX

By Counsel

/s/ David C. Kohler
Alexander Wellford
David C. Kohler

Christian, Barton, Epps,
Brent & Chappell
1200 Mutual Building
909 E. Main Street
Richmond, Virginia 23219
804/644-7851

Of Counsel

CERTIFICATE

I certify that a true copy of the foregoing Motion for Partial Summary Judgment was hand delivered on the 27th day of June, 1983, to John H. OBrion, Jr., Esquire, and Kenneth X. Warren, Esquire, Browder, Russell, Morris & Butcher, 1200 Ross Building, Richmond, Virginia 23219, counsel to the plaintiff herein.

/s/David C. Kohler
David C. Kohler

APPENDIX A TO DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGEMENT

An Open Letter
to the
American People

A Nation At Risk: The Imperative For Educational Reform

A Report to the Nation
Secretary of Education
The National Commission on Excellence in Education
April 1983

Table of Contents

[APPENDICES OMITTED IN PRINTING]

Letter of Transmittal

Honorable T. H. Bell
Secretary of Education
U.S. Department of Education
Washington, D.C. 20202

April 26, 1983

Dear Mr. Secretary:

On August 26, 1981, you created The National Commission on Excellence in Education and directed it to present a report on the quality of education in America to you and to the American people by April of 1983.

It has been my privilege to chair this endeavor and on behalf of the members of the Commission it is my pleasure to transmit this report, *A Nation at Risk: The Imperative for Educational Reform.*

Our purpose has been to help define the problems afflicting American education and to provide solutions, not search for scapegoats. We addressed the main issues as we saw them, but have not attempted to treat the subordinate matters in any detail. We were forthright in our discussions and have been candid in our report regarding both the strengths and weaknesses of American education.

The Commission deeply believes that the problems we have discerned in American education can be both understood and corrected if the people of our country, together with those who have public responsibility in the matter, care enough and are courageous enough to do what is required.

Each member of the Commission appreciates your leadership in having asked this diverse group of persons to examine one of the central issues which will define our Nation's future. We especially welcomed your confidence throughout the course of our deliberations and your anticipation of a report free of political partisanship.

It is our collective and earnest hope that you will continue to provide leadership in this effort by assuring wide dis-

semination and full discussion of this report, and by encouraging appropriate action throughout the country. We believe that materials compiled by the Commission in the course of its work constitute a major resource for all persons interested in American education.

The other commissioners and I sincerely appreciate the opportunity to have served our country as members of the National Commission on Excellence in Education, and on their behalf I remain,

Respectfully,

/s/ David P. Gardener
David Pierpont Gardner
Chariman

Members of the National Commission on Excellence in Education

David P. Gardner (Chair)
President
University of Utah and
President-Elect, University of California
Salt Lake City, Utah

Yvonne W. Larsen (Vice-Chair)
Immediate Past-President
San Diego City School Board
San Diego, California

William O. Baker
Chairman of the Board (Retired)
Bell Telephone Laboratories
Murray Hill, New Jersey

Anne Campbell
Former Commissioner of Education
State of Nebraska
Lincoln, Nebraska

Emeral A. Crosby
Principal
Northern High School
Detroit, Michigan

Charles A. Foster, Jr.
Immediate Past-President
Foundation for Teaching Economics
San Francisco, California

Norman C. Francis
President
Xavier University of Louisiana
New Orleans, Louisiana

A. Bartlett Giamatti
President
Yale University
New Haven, Connecticut

Shirley Gordon
President
Highline Community College
Midway, Washington

Robert V. Haderlein
Immediate Past-President
National School Boards Association
Girard, Kansas

Gerald Holton
Mallinckrodt Professor of Physics and Professor of the History of Science
Harvard University
Cambridge, Massachusetts

Annette Y. Kirk
Kirk Associates
Mecosta, Michigan

Margaret S. Marston
Member
Virginia State Board of Education
Arlington, Virginia

Albert H. Quie
Former Governor
State of Minnesota
St. Paul, Minnesota

Francisco D. Sanchez, Jr.
Superintendent of Schools
Albuquerque Public Schools
Albuquerque, New Mexico

Glenn T. Seaborg
University Professor of chemistry and Nobel Laureate
University of California
Berkeley, California

Jay Sommer
National Teacher of the Year, 1981-82
Foreign Language Department
New Rochelle High School
New Rochelle, New York

Richard Wallace
Principal
Lutheran High School East
Cleveland Heights, Ohio

Introduction

Secretary of Education T. H. Bell created the National Commission on Excellence in Education on August 26, 1981, directing it to examine the quality of education in the United States and to make a report to the Nation and to him within 18 months of its first meeting. In accordance with the Secretary's instructions, this report contains practical recommendations for educational improvement and fulfills the Commission's responsibilities under the terms of its charter.

The Commission was created as a result of the Secretary's concern about "the widespread public perception that something is seriously remiss in our educational system." Soliciting the "support of all who care about our future," the Secretary noted that he was establishing the Commission based on his "responsibility to provide leadership, constructive criticism, and effective assistance to schools and universities."

The Commission's charter contained several specific charges to which we have given particular attention. These included:

- assessing the quality of teaching and learning in our Nation's public and private schools, colleges, and universities;
- comparing American schools and colleges with those of other advanced nations;
- studying the relationship between college admissions requirements and student achievement in high school;
- identifying educational programs which result in notable student success in college;
- assessing the degree to which major social and educational changes in the last quarter century have affected student achievement; and

- defining problems which must be faced and overcome if we are successfully to pursue the course of excellence in education.

The Commission's charter directed it to pay particular attention to teenage youth, and we have done so largely by focusing on high schools. Selective attention was given to the formative years spent in elementary schools, to higher education, and to vocational and technical programs. We refer those interested in the need for similar reform in higher education to the recent report of the American Council on Education. *To Strengthen the Quality of Higher Education.*

In going about its work the Commission has relied in the main upon five sources of information:

- papers commissioned from experts on a variety of educational issues;
- administrators, teachers, students, representatives of professional and public groups, parents, business leaders, public officials, and scholars who testified at eight meetings of the full Commission, six public hearings, two panel discussions, a symposium, and a series of meetings organized by the Department of Education's Regional Offices;
- existing analyses of problems in education;
- letters form concerned citizens, teachers, and administrators who volunteered extensive comments on problems and possibilities in American education; and
- descriptions of notable programs and promising approaches in education.

To these public-minded citizens who took the trouble to share their concerns with us—frequently at their own expense in time, money, and effort—we extend our thanks.

In all cases, we have benefited from their advice and taken their views into account; how we have treated their suggestions is, of course, our responsibility alone. In addition, we are grateful to the individuals in schools, universities, foundations, business, government, and communities throughout the United States who provided the facilities and staff so necessary to the success of our many public functions.

The Commission was impressed during the course of its activities by the diversity of opinion it received regarding the condition of American education and by conflicting views about what should be done. In many ways, the membership of the Commission itself reflected that diversity and difference of opinion during the course of its work. This report, nevertheless, gives evidence that men and women of good will can agree on common goals and on ways to pursue them.

The Commission's charter, the authors and topics of commissioned papers, a list of the public events, and a roster of the Commission's staff are included in the appendices which complete this volume.

All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment, and to manage their own lives, thereby serving not only their own interests, but also the progress of society itself.

A Nation At Risk

Our Nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world. This report is concerned with only one of the many causes and dimensions of the problem, but it is the one that undergirds American prosperity, security, and civility. We report to the American people that while we can take justifiable pride in what our schools and colleges have historically accomplished and contributed to the United States and the well-being of its people, the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people. What was unimaginable a generation ago has begun to occur—others are matching and surpassing our educational attainments.

If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves. We have even squandered the gains in student achievement made in the wake of the Sputnik challenge. Moreover, we have dismantled essential support systems which helped make those gains possible. We have, in effect, been committing an act of unthinking, unilateral educational disarmament.

Our society and its educational institutions seem to have lost sight of the basic purposes of schooling, and of the high expectations and disciplined effort needed to attain them. This report, the result of 18 months of study, seeks to generate reform of our educational system in funda-

mental ways and to renew the Nation's commitment to schools and colleges of high quality throughout the length and breadth of our land.

That we have compromised this commitment is, upon reflection, hardly surprising, given the multitude of often conflicting demands we have placed on our Nation's schools and colleges. They are routinely called on to provide solutions to personal, social, and political problems that the home and other institutions either will not or cannot resolve. We must understand that these demands on our schools and colleges often exact an educational cost as well as a financial one.

On the occasion of the Commission's first meeting, President Reagan noted the central importance of education in American life when he said: "Certainly there are few areas of American life as important to our society, to our people, and to our families as our schools and colleges." This report, therefore, is as much an open letter to the American people as it is a report to the Secretary of Education. We are confident that the American people, properly informed, will do what is right for their children and for the generations to come.

The Risk

History is not kind to idlers. The time is long past when America's destiny was assured simply by an abundance of natural resources and inexhaustible human enthusiasm, and by our relative isolation from the malignant problems of older civilizations. The world is indeed one global village. We live among determined, well-educated, and strongly motivated competitors. We compete with them for international standing and markets, not only with products but also with the ideas of our laboratories and neighborhood workshops. America's position in the world may once have

been reasonably secure with only a few exceptionally well-trained men and women. It is no longer.

The risk is not only that the Japanese make automobiles more efficiently than Americans and have government subsidies for development and export. It is not just that the South Koreans recently built the world's most efficient steel mill, or that American machine tools, once the pride of the world, are being displaced by German products. It is also that these developments signify a redistribution of trained capability throughout the globe. Knowledge, learning, information, and skilled intelligence are the new raw materials of international commerce and are today spreading throughout the world as vigorously as miracle drugs, synthetic fertilizers, and blue jeans did earlier. If only to keep and improve on the slim competitive edge we still retain in world markets, we must dedicate ourselves to the reform of our educational system for the benefit of all—old and young alike, affluent and poor, majority and minority. Learning is the indispensable investment required for success in the "information age" we are entering.

Our concern, however, goes well beyond matters such as industry and commerce. It also includes the intellectual, moral, and spiritual strengths of our people which knit together the very fabric of our society. The people of the United States need to know that individuals in our society who do not possess the levels of skill, literacy, and training essential to this new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life. A high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom.

For our country to function, citizens must be able to reach some common understandings on complex issues,

often on short notice and on the basis of conflicting or incomplete evidence. Education helps form these common understandings, a point Thomas Jefferson made long ago in his justly famous dictum:

> I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion.

Part of what is at risk is the promise first made on this continent: All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment and to manage their own lives, thereby serving not only their own interests but also the progress of society itself.

Indicators of the Risk

The educational dimensions of the risk before us have been amply documented in testimony received by the Commission. For example:

- International comparisons of student achievement, completed a decade ago, reveal that on 19 academic tests American students were never first or second and, in comparison with other industrialized nations, were last seven times.

- Some 23 million American adults are functionally illiterate by the simplest tests of everyday reading, writing, and comprehension.

- About 13 percent of all 17-year-olds in the United States can be considered functionally illiterate. Functional illiteracy among minority youth may run as high as 40 percent.
- Average achievement of high school students on most standardized tests is now lower than 26 years ago when Sputnik was launched.
- Over half the population of gifted students do not match their tested ability with comparable achievement in school.
- The College Board's Scholastic Aptitude Tests (SAT) demonstrated a virtually unbroken decline from 1963 to 1980. Average verbal scores fell over 50 points and average mathematics scores dropped nearly 40 points.
- College Board achievement tests also reveal consistent declines in recent years in such subjects as physics and English.
- Both the number and proportion of students demonstrating superior achievement on the SATs (i.e., those with scores of 650 or higher) have also dramatically declined.
- Many 17-year-olds do not possess the "higher order" intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps.
- There was a steady decline in science achievement scores of U.S. 17-year-olds as measured by national assessments of science in 1969, 1973, and 1977.
- Between 1975 and 1980, remedial mathematics courses in public 4-year colleges increased by 72

percent and now constitute one-quarter of all mathematics courses taught in those institutions.

- Average tested achievement of students graduating from college is also lower.
- Business and military leaders complain that they are required to spend millions of dollars on costly remedial education and training programs in such basic skills as reading, writing, spelling, and computation. The Department of the Navy, for example, reported to the Commission that one-quarter of its recent recruits cannot read at the ninth grade level, the minimum needed simply to understand written safety instructions. Without remedial work they cannot even begin, much less complete, the sophisticated training essential in much of the modern military.

These deficiencies come at a time when the demand for highly skilled workers in new fields is accelerating rapidly. For example:

- Computers and computer-controlled equipment are penetrating every aspect of our lives—homes, factories, and offices.
- One estimate indicates that by the turn of the century millions of jobs will involve laser technology and robotics.
- Technology is radically transforming a host of other occupations. They include health care, medical science, energy production, food processing, construction, and the building, repair, and maintenance of sophisticated scientific, educational, military, and industrial equipment.

Analysts examining these indicators of student performance and the demands for new skills have made some chilling observations. Educational researcher Paul Hurd

concluded at the end of a thorough national survey of student achievement that within the context of the modern scientific revolution, "We are raising a new generation of Americans that is scientifically and technologically illiterate." In a similar vein, John Slaughter, a former Director of the National Science Foundation, warned of "a growing chasm between a small scientific and technological elite and a citizenry ill-informed, indeed uninformed, on issues with a science component."

But the problem does not stop there, nor do all observers see it the same way. Some worry that schools may emphasize such rudiments as reading and computation at the expense of other essential skills such as comprehension, analysis, solving problems, and drawing conclusions. Still others are concerned that an over-emphasis on technical and occupational skills will leave little time for studying the arts and humanities that so enrich daily life, help maintain civility, and develop a sense of community. Knowledge of the humanities, they maintain, must be harnessed to science and technology if the latter are to remain creative and humane, just as the humanities need to be informed by science and technology if they are to remain relevant to the human condition. Another analyst, Paul Copperman, has drawn a sobering conclusion. Until now, he has noted:

> Each generation of Americans has outstripped its parents in education, in literacy, and in economic attainment. For the first time in the history of our country, the educational skills of one generation will not surpass, will not equal, will not even approach, those of their parents.

It is important, of course, to recognize that *the average citizen* today is better educated and more knowledgeable than the average citizen of a generation ago—more literate, and exposed to more mathematics, literature, and science. The positive impact of this fact on the well-being of

our country and the lives of our people cannot be overstated. Nevertheless, *the average graduate* of our schools and colleges today is not as well-educated as the average graduate of 25 or 35 years ago, when a much smaller proportion of our population completed high school and college. The negative impact of this fact likewise cannot be overstated.

Hope and Frustration

Statistics and their interpretation by experts show only the surface dimension of the difficulties we face. Beneath them lies a tension between hope and frustration that characterizes current attitudes about education at every level.

We have heard the voices of high school and college students, school board members, and teachers, of leaders of industry, minority groups, and higher education; of parents and State officials. We could hear the hope evident in their commitment to quality education and in their descriptions of outstanding programs and schools. We could also hear the intensity of their frustration, a growing impatience with shoddiness in many walks of American life, and the complaint that this shoddiness is too often reflected in our schools and colleges. Their frustration threatens to overwhelm their hope.

What lies behind this emerging national sense of frustration can be described as both a dimming of personal expectations and the fear of losing a shared vision for America.

On the personal level the student, the parent, and the caring teacher all perceive that a basic promise is not being kept. More and more young people emerge from high school ready neither for college nor for work. This predicament becomes more acute as the knowledge base continues its rapid expansion, the number of traditional jobs

shrinks, and new jobs demand greater sophistication and preparation.

On a broader scale, we sense that this undertone of frustration has significant political implications, for it cuts across ages, generations, races, and political and economic groups. We have come to understand that the public will demand that educational and political leaders act forcefully and effectively on these issues. Indeed, such demands have already appeared and could well become a unifying national preoccupation. This unity, however, can be achieved only if we avoid the unproductive tendency of some to search for scapegoats among the victims, such as the beleaguered teachers.

On the positive side is the significant movement by political and educational leaders to search for solutions—so far centering largely on the nearly desperate need for increased support for the teaching of mathematics and science. This movement is but a start on what we believe is a larger and more educationally encompassing need to improve teaching and learning in fields such as English, history, geography, economics, and foreign languages. We believe this movement must be broadened and directed toward reform and excellence throughout education.

Excellence in Education

We define "excellence" to mean several related things. At the level of the *individual learner*, it means performing on the boundary of individual ability in ways that test and push back personal limits, in school and in the workplace. Excellence characterizes a *school or college* that sets high expectations and goals for all learners, then tries in every way possible to help students reach them. Excellence characterizes a *society* that has adopted these policies, for it will then be prepared through the education and skill of its people to respond to the challenges of a rapidly chang-

ing world. Our Nation's people and its schools and colleges must be committed to achieving excellence in all these senses.

We do not believe that a public commitment to excellence and educational reform must be made at the expense of a strong public commitment to the equitable treatment of our diverse population. The twin goals of equity and high-quality schooling have profound and practical meaning for our economy and society, and we cannot permit one to yield to the other either in principle or in practice. To do so would deny young people their chance to learn and live according to their aspirations and abilities. It also would lead to a generalized accommodation to mediocrity in our society on the one hand or the creation of an undemocratic elitism on the other.

Our goal must be to develop the talents of all to their fullest. Attaining that goal requires that we expect and assist all students to work to the limits of their capabilities. We should expect schools to have genuinely high standards rather than minimum ones, and parents to support and encourage their children to make the most of their talents and abilities.

The search for solutions to our educational problems must also include a commitment to life-long learning. The task of rebuilding our system of learning is enormous and must be properly understood and taken seriously: Although a million and a half new workers enter the economy each year from our schools and colleges, the adults working today will still make up about 75 percent of the workforce in the year 2000. These workers, and new entrants into the workforce, will need further education and retraining if they—and we as a Nation—are to thrive and prosper.

The Learning Society

In a world of ever-accelerating competition and change in the conditions of the workplace, of ever-greater danger, and of ever-larger opportunities for those prepared to meet them, educational reform should focus on the goal of creating a Learning Society. At the heart of such a society is the commitment to a set of values and to a system of education that affords all members the opportunity to stretch their minds to full capacity, from early childhood through adulthood, learning more as the world itself changes. Such a society has as a basic foundation the idea that education is important not only because of what it contributes to one's career goals but also because of the value it adds to the general quality of one's life. Also at the heart of the Learning Society are educational opportunities extending far beyond the traditional institutions of learning, our schools and colleges. They extend into homes and workplaces; into libraries, art galleries, museums, and science centers; indeed, into every place where the individual can develop and mature in work and life. In our view, formal schooling in youth is the essential foundation for learning throughout one's life. But without life-long learning, one's skills will become rapidly dated.

In contrast to the ideal of the Learning Society, however, we find that for too many people education means doing the minimum work necessary for the moment, then coasting through life on what may have been learned in its first quarter. But this should not surprise us because we tend to express our educational standards and expectations largely in terms of "minimum requirements." And where there should be a coherent continuum of learning, we have none, but instead an often incoherent, outdated patchwork quilt. Many individual, sometimes heroic, examples of schools and colleges of great merit do exist. Our findings and testimony confirm the vitality of a number

of notable schools and programs, but their very distinction stands out against a vast mass shaped by tensions and pressures that inhibit systematic academic and vocational achievement for the majority of students. In some metropolitan areas basic literacy has become the goal rather than the starting point. In some colleges maintaining enrollments is of greater day-to-day concern than maintaining rigorous academic standards. And the ideal of academic excellence as the primary goal of schooling seems to be fading across the board in American education.

Thus, we issue this call to all who care about America and its future; to parents and students; to teachers, administrators, and school board members; to colleges and industry; to union members and military leaders; to governors and State legislators; to the President; to members of Congress and other public officials; to members of learned and scientific societies; to the print and electronic media; to concerned citizens everywhere. America is at risk.

We are confident that American can address this risk. If the tasks we set forth are initiated now and our recommendations are fully realized over the next several years, we can expect reform of our Nation's schools, colleges, and universities. This would also reverse the current declining trend—a trend that stems more from weakness of purpose, confusion of vision, underuse of talent, and lack of leadership, than from conditions beyond our control.

The Tools at Hand

It is our conviction that the essential raw materials needed to reform our educational system are waiting to be mobilized through effective leadership:

- the natural abilities of the young that cry out to be developed and the undiminished concern of parents for the well-being of their children;

- the commitment of the Nation to high retention rates in schools and colleges and to full access to education for all;
- the persistent and authentic American dream that superior performance can raise one's state in life and shape one's own future;
- the dedication, against all odds, that keeps teachers serving in schools and colleges, even as the rewards diminish;
- our better understanding of learning and teaching and the implications of this knowledge for school practice, and the numerous examples of local success as a result of superior effort and effective dissemination;
- the ingenuity of our policymakers, scientists, State and local educators, and scholars in formulating solutions once problems are better understood;
- the traditional belief that paying for education is an investment in ever-renewable human resources that are most durable and flexible than capital plant and equipment, and the availability in this country of sufficient financial means to invest in education;
- the equally sound tradition, from the Northwest Ordinance of 1787 until today, that the Federal Government should supplement State, local, and other resources to foster key national educational goals; and
- the voluntary efforts of individuals, businesses, and parent and civic groups to cooperate in strengthening educational programs.

These raw materials, combined with the unparalleled array of educational organizations in America, offer us the possibility to create a Learning Society, in which public,

private, and parochial schools; colleges and universities; vocational and technical schools and institutes; libraries; science centers, museums, and other cultural institutions; and corporate training and retraining programs offer opportunities and choices for all to learn throughout life.

The Public's Commitment

Of all the tools at hand, the public's support for education is the most powerful. In a message to a National Academy of Sciences meeting in May 1982, President Reagan commented on this fact when he said:

> This public awareness—and I hope public action—is long overdue. . . . This country was built on American respect for education. . . . Our challenge now is to create a resurgence of that thirst for education that typifies our Nation's history.

The most recent (1982) Gallup Poll of the *Public's Attitudes Toward the Public Schools* strongly supported a theme heard during our hearings: People are steadfast in their belief of this country. They even considered education more important than developing the best industrial system or the strongest military force, perhaps because they understood education as the cornerstone of both. They also held that education is "extremely important" to one's future success, and that public education should be the top priority for additional Federal funds. Education occupied first place among 12 funding categories considered in the survey—above health care, welfare, and military defense, with 55 percent selecting public education as one of their first three choices. Very clearly, the public understands the primary importance of education as the foundation for a satisfying life, an enlightened and civil society, a strong economy, and a secure Nation.

At the same time, the public has no patience with undemanding and superfluous high school offerings. In another

survey, more than 75 percent of all those questioned believed every student planning to go to college should take 4 years of mathematics, English, history U.S. government, and science, with more than 50 percent adding 2 years each of a foreign language and economics or business. The public even supports requiring much of this curriculum for students who do not plan to go to college. These standards far exceed the strictest high school graduation requirements of any State today, and they also exceed the admission standards of all but a handful of our most selective colleges and universities.

Another dimension of the public's support offers the prospect of constructive reform. The best term to characterize it may simply be the honorable word "patriotism." Citizens know intuitively what some of the best economists have shown in their research, that education is one of the chief engines of a society's material well-being. They know, too, that education is the common bond of a pluralistic society and helps tie us to other cultures around the globe. Citizens also know in their bones that the safety of the United States depends principally on the wit, skill, and spirit of a self-confident people, today and tomorrow. It is, therefore, essential—especially in a period of long-term decline in educational achievement—for government at all levels to affirm its responsibility for nurturing the Nation's intellectual capital.

And perhaps most important, citizens know and believe that the meaning of America to the rest of the world must be something better than it seems to many today. Americans like to think of this Nation as the preeminent country for generating the great ideas and material benefits for all mankind. The citizen is dismayed at a steady 15-year decline in industrial productivity, as one great American industry after another falls to world competition. The citizen wants the country to act on the belief, expressed in our hearings and by the large majority in the Gallup Poll, that education should be at the top of the Nation's agenda.

Findings

We conclude that declines in educational performance are in large part the result of disturbing inadequacies in the way the educational process itself is often conducted. The findings that follow, culled from a much more extensive list, reflect four important aspects of the educational process: content, expectations, time, and teaching.

Findings Regarding Content

By content we mean the very "stuff" of education, the curriculum. Because of our concern about the curriculum, the Commission examined patterns of courses high school students took in 1964-69 compared with course patterns in 1976-81. On the basis of these analyses we conclude:

- Secondary school curricula have been homogenized, diluted, and diffused to the point that they no longer have a central purpose. In effect, we have a cafeteria-style curriculum in which the appetizers and desserts can easily be mistaken for the main courses. Students have migrated from vocational and college preparatory programs to "general track" courses in large numbers. The proportion of students taking a general program of study has increased from 12 percent in 1964 to 42 percent in 1979.

- This curricular smorgasbord, combined with extensive student choice, explains a great deal about where we find ourselves today. We offer intermediate algebra, but only 31 percent of our recent high school graduates complete it; we offer French 1, but only 13 percent complete it; and we offer geography, but only 16 percent complete it. Calculus is available in schools enrolling about 60 percent of all students, but only 6 percent of all students complete it.

- Twenty-five percent of the credits earned by general track high school students are in physical and health education, work experience outside the school, remedial English and mathematics, and personal service and development courses, such as training for adulthood and marriage.

Findings Regarding Expectations

We define expectations in terms of the level of knowledge, abilities, and skills school and college graduates should possess. They also refer to the time, hard work, behavior, self-discipline, and motivation that are essential for high student achievement. Such expectations are expressed to students in several different ways:

- by grades, which reflect the degree to which students demonstrate their mastery of subject matter;
- through high school and college graduation requirements, which tell students which subjects are most important;
- by the presence or absence of rigorous examinations requiring students to demonstrate their mastery of content and skill before receiving a diploma or a degree;
- by college admissions requirements, which reinforce high school standards; and
- by the difficulty of the subject matter students confront in their texts and assigned readings.

Our analyses in each of these areas indicate notable deficiencies:

- the amount of homework for high school seniors has decreased (two-thirds report less than 1 hour a night) and grades have risen as average student achievement has been declining.

- In many other industrialized nations, courses in mathematics (other than arithmetic or general mathematics), biology, chemistry, physics, and geography start in grade 6 and are required of *all* students. The time spent on these subjects, based on class hours, is about three times that spent by even the most science-oriented U.S. students, i.e., those who select 4 years of science and mathematics in secondary school.

- A 1980 State-by-State survey of high school diploma requirements reveals that only eight States require high schools to offer foreign language instruction, but none requires students to take the courses. Thirty-five States require only 1 year of mathematics, and 36 require only 1 year of science for a diploma.

- In 13 States, 50 percent or more of the units required for high school graduation may be electives chosen by the student. Given this freedom to choose the substance of half or more of their education, many students opt for less demanding personal service courses, such as bachelor living.

- "Minimum competency" examinations (now required in 37 States) fall short of what is needed, as the "minimum" tends to become the "maximum," thus lowering educational standards for all.

- One-fifth of all 4-year public colleges in the United States must accept every high school graduate within the State regardless of program followed or grades, thereby serving notice to high school students that they can expect to attend college even if they do not follow a demanding course of study in high school or perform well.

- About 23 percent of our more selective colleges and universities reported that their general level of selectivity declined during the 1970s, and 29 percent reported reducing the number of specific high school

courses required for admission (usually by dropping foreign language requirements, which are now specified as a condition for admission by only one-fifth of our institutions of higher education).

- Too few experienced teachers and scholars are involved in writing textbooks. During the past decade or so a large number of texts have been "written down" by their publishers to ever-lower reading levels in response to perceived market demands.
- A recent study by Education Products Information Exchange revealed that a majority of students were able to master 80 percent of the material in some of their subject-matter texts before they had even opened the books. Many books do not challenge the students to whom they are assigned.
- Expenditures for textbooks and other instructional materials have declined by 50 percent over the past 17 Years. While some recommend a level of spending on texts of between 50 and 10 percent of the operating costs of schools, the budgets for basal texts and related materials have been dropping during the past decade and a half to only 0.7 percent day.

Findings Regarding Time

Evidence presented to the Commission demonstrates three disturbing facts about the use that American schools and students make of time: (1) compared to other nations, American students spend much less time on school work; (2) time spent in the classroom and on homework is often used ineffectively; and (3) schools are not doing enough to help students develop either the study skills required to use time well or the willingness to spend more time on school work.

- In England and other industrialized countries, it is not unusual for academic high school students to spend 8 hours a day at school, 220 days per year.

In the United States, by contrast, the typical school day lasts 6 hours and the school year is 180 days.

- In many schools, the time spent learning how to cook and drive counts as much toward a high school diploma as the time spent studying mathematics, English, chemistry, U.S. history, or biology.
- A study of the school week in the United States found that some schools provided students only 17 hours of academic instruction during the week, and the average school provided about 22.
- A California study of individual classrooms found that because of poor management of classroom time, some elementary students received only one-fifth of the instruction others received in reading comprehension.
- In most schools, the teaching of study skills is haphazard and unplanned. Consequently, many students complete high school and enter college without disciplined and systematic study habits.

Findings Regarding Teaching

The Commission found that not enough of the academically able students are being attracted to teaching; that teacher preparation programs need substantial improvement; that the professional working life of teachers is on the whole unacceptable; and that a serious shortage of teachers exists in key fields.

- Too many teachers are being drawn from the bottom quarter of graduating high school and college students.
- The teacher preparation curriculum is weighted heavily with courses in "educational methods" at the expense of courses in subjects to be taught. A survey of 1,350 institutions training teachers indicated that 41 percent of the time of elementary school teacher

candidates is spent in education courses, which reduces the amount of time available for subject matter courses.

- The average salary after 12 years of teaching is only $17,000 per year, and many teachers are required to supplement their income with part-time and summer employment. In addition, individual teachers have little influence in such critical professional decisions as, for example, textbook selection.
- Despite widespread publicity about an overpopulation of teachers, severe shortages of certain kinds of teachers exist: in the fields of mathematics, science, and foreign languages; and among specialists in education for gifted and talented, language minority, and handicapped students.
- The shortage of teachers in mathematics and science is particularly severe. A 1981 survey of 45 States revealed shortages of mathematics teachers in 43 States, critical shortages of earth sciences teachers in 33 States, and of physics teachers everywhere.
- Half of the newly employed mathematics, science, and English teachers are not qualified to teach these subjects; fewer than one-third of U.S. high schools offer physics taught by qualified teachers.

Recommendations

In light of the urgent need for improvement, both immediate and long term, this Commission has agreed on a set of recommendations that the American people can begin to act on now, that can be implemented over the next several years, and that promise lasting reform. The topics are familiar; there is little mystery about what we believe must be done. Many schools, districts, and States are already giving serious and constructive attention to these matters,

even though their plans may differ from our recommendations in some details.

We wish to note that we refer to public, private, and parochial schools and colleges alike. All are valuable national resources. Examples of actions similar to those recommended below can be found in each of them.

We must emphasize that the variety of student aspirations, abilities, and preparation requires that appropriate content be available to satisfy diverse needs. Attention must be directed to both the nature of the content available and to the needs of particular learners. The most gifted students, for example, may need a curriculum enriched and accelerated beyond even the needs of other students of high ability. Similarly, educationally disadvantaged students may require special curriculum materials, smaller classes, or individual tutoring to help them master the material presented. Nevertheless, there remains a common expectation: We must demand the best effort and performance from all students. Whether they are gifted or less able, affluent or disadvantaged, whether destined for college, the farm, or industry.

Our recommendations are based on the beliefs that everyone can learn, that everyone is born with an *urge* to learn which can be nurtured, that a solid high school education is within the reach of virtually all, and that life-long learning will equip people with the skills required for new careers and for citizenship.

Recommendation A: Content

We recommend *that State and local high school graduation requirements be strengthened and that,* at a minimum, all *students seeking a diploma be required to lay the foundations in the Five New Basics by taking the following curriculum during their 4 years of high school: (a) 4 years of English; (b) 3 years of mathematics; (c) 3 years of science; (d) 3 years of social studies; and (e) one-half year of computer science.*

For the college-bound, 2 years of foreign language in high school are strongly recommended in addition to those taken earlier.

Whatever the student's educational or work objectives, knowledge of the New Basics is the foundation of success for the after-school years and, therefore, forms the core of the modern curriculum. A high level of shared education in these Basics, together with work in the fine and performing arts and foreign languages, constitutes the mind and spirit of our culture. The following Implementing Recommendations are intended as illustrative descriptions. They are included here to clarify what we mean by the essentials of a strong curriculum.

Implementing Recommendations

1. The teaching of *English* in high school should equip graduates to: (a) comprehend, interpret, evaluate, and use what they read; (b) write well-organized, effective papers; (c) listen effectively and discuss ideas intelligently; and (d) know our literary heritage and how it enhances imagination and ethical understanding, and how it relates to the customs, ideas, and values of today's life and culture.
2. The teaching of *mathematics* in high school should equip graduates to: (a) understand geometric and algebraic concepts; (b) understand elementary probability and statistics; (c) apply mathematics in everyday situations; and (d) estimate, approximate, measure, and test the accuracy of their calculations. In addition to the traditional sequence of studies available for college-bound students, new, equally demanding mathematics curricula need to be developed for those who do not plan to continue their formal education immediately.
3. The teaching of *science* in high school should provide graduates with an introduction to: (a) the concepts,

laws, and processes of the physical and biological sciences; (b) the methods of scientific inquiry and reasoning; (c) the application of scientific knowledge to everyday life; and (d) the social and environmental implications of scientific and technological development. Science courses must be revised and updated for both the college-bound and those not intending to go to college. An example of such work is the American Chemical Society's "Chemistry in the Community" program.

4. The teaching of *social studies* in high school should be designed to: (a) enable students to fix their places and possibilities within the larger social and cultural structure; (b) understand the broad sweep of both ancient and contemporary ideas that have shaped our world; and (c) understand the fundamentals of how our economic system works and how our political system functions; and (d) grasp the difference between free and repressive societies. An understanding of each of these areas is requisite to the informed and committed exercise of citizenship in our free society.

5. The teaching of *computer science* in high school should equip graduates to: (a) understand the computer as an information, computation, and communication device; (b) use the computer in the study of the other Basics and for personal and work-related purposes; and (c) understand the world of computers, electronics, and related technologies.

In addition to the New Basics, other important curriculum matters must be addressed.

6. Achieving proficiency in a *foreign language* ordinarily requires from 4 to 6 years of study and should, therefore, be started in the elementary grades. We believe it is desirable that students achieve such proficiency because study of a foreign language introduces students to non-English-speaking cultures, heightens

awareness and comprehension of one's native tongue, and serves the Nation's needs in commerce, diplomacy, defense, and education.

7. The high school curriculum should also provide students with programs requiring rigorous effort in subjects that advance students" personal, educational, and occupational goals, such as the fine and performing arts and vocational education. These areas complement the New Basics, and they should demand the same level of performance as the Basics.

8. The curriculum in the crucial eight grades leading to the high school years should be specifically designed to provide a sound base for study in those and later years in such areas as English language development and writing, computational and problem solving skills, science, social studies, foreign language, and the arts. These years should foster an enthusiasm for learning and the development of the individual's gifts and talents.

9. We encourage the continuation of efforts by groups such as the American Chemical Society, the American Association for the Advancement of Science, the Modern Language Association, and the National Councils of Teachers of English and Teachers of Mathematics, to revise, update, improve, and make available new and more diverse curricular materials. We applaud the consortia of educators and scientific, industrial, and scholarly societies that cooperate to improve the school curriculum.

Recommendation B: Standards and Expectations

We recommend *that schools, colleges, and universities adopt more rigorous and measurable standards, and higher expectations, for academic performance and student conduct, and that 4-year colleges and universities raise their requirements*

for admission. This will help students do their best educationally with challenging materials in an environment that supports learning and authentic accomplishment.

Implementing Recommendations

1. Grades should be indicators of academic achievement so they can be relied on as evidence of a student's readiness for further study:

2. Four-year colleges and universities should raise their admissions requirements and advise all potential applicants of the standards for admission in terms of specific courses required, performance in these areas, and levels of achievement on standardized achievement tests in each of the five Basics and, where applicable, foreign languages.

3. Standardized tests of achievement (not to be confused with aptitude tests) should be administered at major transition points from one level of schooling to another and particularly from high school to college or work. The purposes of these tests would be to: (a) certify the student's credentials; (b) identify the need for remedial intervention; and (c) identify the opportunity for advanced or accelerated work. The tests should be administered as part of a nationwide (but not Federal) system of State and local standardized tests. This system should include other diagnostic procedures that assist teachers and students to evaluate student progress.

4. Textbooks and other tools of learning and teaching snould be upgraded and updated to assure more rigorous content. We call upon university scientists, scholars, and members of professional societies, in collaboration with master teachers, to help in this task, as they did in the post-Sputnik era. They should assist willing publishers in developing the products or publish

their own alternatives where there are persistent inadequacies.

5. In considering textbooks for adoption, States and school districts should: (a) evaluate texts and other materials on their ability to present rigorous and challenging material clearly; and (b) require publishers to furnish evaluation data on the material's effectiveness.

6. Because no textbook in any subject can be geared to the needs of all students, funds should be made available to support text development in "thin-market" areas, such as those for disadvantaged students, the learning disabled, and the gifted and talented.

7. To assure quality, all publishers should furnish evidence of the quality and appropriateness of textbooks, based on results from field trials and credible evaluations. In view of the enormous numbers and varieties of texts available, more widespread consumer information services for purchasers are badly needed.

8. New instructional materials should reflect the most current applications of technology in appropriate curriculum areas, the best scholarship in each discipline, and research in learning and teaching.

Recommendation C: Time

We recommend *that significantly more time be devoted to learning the New Basics. This will require more effective use of the existing school day, a longer school day, or a lengthened school year.*

Implementing Recommendations

1. Students in high schools should be assigned far more homework than is now the case.

2. Instruction in effective study and work skills, which are essential if school and independent time is to be used efficiently, should be introduced in the early grades and continued throughout the student's schooling.

3. School districts and State legislatures should strongly consider 7-hour school days, as well as a 200- to 220-day school year.

4. The time available for learning should be expanded through better classroom management and organization of the school day. If necessary, additional time should be found to meet the special needs of slow learners, the gifted, and others who need more instructional diversity than can be accommodated during a conventional school day or school year.

5. The burden on teachers for maintaining discipline should be reduced through the development of firm and fair codes of student conduct that are enforced consistently, and by considering alternative classrooms, programs, and schools to meet the needs of continually disruptive students.

6. Attendance policies with clear incentives and sanctions should be used to reduce the amount of time lost through student absenteeism and tardiness.

7. Administrative burdens on the teacher and related intrusions into the school day should be reduced to add time for teaching and learning.

8. Placement and grouping of students, as well as promotion and graduation policies, should be guided by the academic progress of students and their instructional needs, rather than by rigid adherence to age.

Recommendation D: Teaching

This recommendation *consists of seven parts. Each is intended to improve the preparation of teachers or to make teaching a more rewarding and respected profession. Each of the seven stands on its own and should not be considered solely as an implementing recommendation.*

1. Persons preparing to teach should be required to meet high educational standards, to demonstrate an aptitude for teaching, and to demonstrate competence in an academic discipline. Colleges and universities offering teacher preparation programs should be judged by how well their graduates meet these criteria.

2. Salaries for the teaching profession should be increased and should be professionally competitive, market-sensitive, and performance-based. Salary, promotion, tenure, and retention decisions should be tied to an effective evaluation system that includes peer review so that superior teachers can be rewarded, average ones encouraged, and poor ones either improved or terminated.

3. School boards should adopt an 11-month contract for teachers. This would ensure time for curriculum and professional development, programs for students with special needs, and a more adequate level of teacher compensation.

4. School boards, administrators, and teachers should cooperate to develop career ladders for teachers that distinguish among the beginning instructor, the experienced teacher, and the master teacher.

5. Substantial nonschool personnel resources should be employed to help solve the immediate problem of the shortage of mathematics and science teaches. Qualified

individuals including recent graduates with mathematics and science degrees, graduate students, and industrial and retired scientists could, with appropriate preparation, immediately begin teaching in these fields. A number of our leading science centers have the capacity to begin educating and retraining teachers immediately. Other areas of critical teacher need, such as English, must also be addressed.

6. Incentives, such as grants and loans, should be made available to attract outstanding students to the teaching profession, particularly in those areas of critical shortage.

7. Master teachers should be involved in designing teacher preparation programs and in supervising teachers during their probationary years.

Recommendation E: Leadership and Fiscal Support

We recommend *that citizens across the Nation hold educators and elected officials responsible for providing the leadership necessary to achieve these reforms, and that citizens provide the fiscal support and stability required to bring about the reforms we propose.*

Implementing Recommendations

1. Principals and superintendents must play a crucial leadership role in developing school and community support for the reforms we propose, and school boards must provide them with the professional development and other support required to carry out their leadership role effectively. The Commission stresses the distinction between leadership skills involving persuasion, setting goals and developing community consensus behind them, and managerial and supervisory skills. Although the latter are necessary; we believe that school boards

must consciously develop leadership skills at the school and district levels if the reforms we propose are to be achieved.

2. State and local officials, including school board members, governors, and legislators, have *the primary responsibility* for financing and governing the schools, and should incorporate the reforms we propose in their educational policies and fiscal planning.

3. The Federal Government, in cooperation with States and localities, should help meet the needs of key groups of students such as the gifted and talented, the socioeconomically disadvantaged, minority and language minority students, and the handicapped. In combination these groups include both national resources and the Nation's youth who are most at risk.

4. In addition, we believe the Federal Government's role includes several functions of national consequence that States and localities alone are unlikely to be able to meet: protecting constitutional and civil rights for students and school personnel; collecting data, statistics, and information about education generally; supporting curriculum improvement and research on teaching, learning, and the management of schools; supporting teacher training in areas of critical shortage or key national needs; and providing student financial assistance and research and graduate training. We believe the assistance of the Federal Government should be provided with a minimum of administrative burden and intrusiveness.

5. The Federal Government has *the primary responsibility* to identify the national interest in education. It should also help fund and support efforts to protect and promote that interest. It must provide the national leadership to ensure that the Nation's public and private resources are marshaled to address the issues discussed in this report.

6. This Commission calls upon educators, parents, and public officials at all levels to assist in bringing about the educational reform proposed in this report. We also call upon citizens to provide the financial support necessary to accomplish these purposes. Excellence costs. But in the long run mediocrity costs far more.

America Can Do It

Despite the obstacles and difficulties that inhibit the pursuit of superior educational attainment, we are confident, with history as our guide, that we can meet our goal. The American educational system has responded to previous challenges with remarkable success. In the 19th century our land-grant colleges and universities provided the research and training that developed our Nation's natural resources and the rich agricultural bounty of the American farm. From the late 1800s through mid-20th century, American schools provided the educated workforce needed to seal the success of the Industrial Revolution and to provide the margin of victory in two world wars. In the early part of this century and continuing to this very day, our schools have absorbed vast waves of immigrants and educated them and their children to productive citizenship. Similarly, the Nation's Black colleges have provided opportunity and undergraduate education to the vast majority of college-educated Black Americans.

More recently, our institutions of higher education have provided the scientists and skilled technicians who helped us transcend the boundaries of our planet. In the last 30 years, the schools have been a major vehicle for expanded social opportunity, and now graduate 75 percent of our young people from high school. Indeed, the proportion of Americans of college age enrolled in higher education is nearly twice that of Japan and far exceeds other nations such as France, West Germany, and the Soviet Union. Moreover, when international comparisons were last made a dec-

ade ago, the top 9 percent of American students compared favorably in achievement with their peers in other countries.

In addition, many large urban areas in recent years report that average student achievement in elementary schools is improving. More and more schools are also offering advanced placement programs and programs for gifted and talented students, and more and more students are enrolling in them.

We are the inheritors of a past that gives us every reason to believe that we will succeed.

A Word to Parents and Students

The task of assuring the success of our recommendations does not fall to the schools and colleges alone. Obviously, faculty members and administrators, along with policymakers and the mass media, will play a crucial role in the reform of the educational system. But even more important is the role of parents and students, and to them we speak directly.

To Parents

You know that you cannot confidently launch your children into today's world unless they are of strong character and well-educated in the use of language, science, and mathematics. They must possess a deep respect for intelligence, achievement, and learning, and the skills needed to use them: for setting goals; and for disciplined work. That respect must be accompanied by an intolerance for the shoddy and second-rate masquerading as "good enough."

You have the right to demand for your children the best our schools and colleges can provide. Your vigilance and your refusal to be satisfied with less than the best are the imperative first step. But your right to a proper education for your children carries a double responsibility. As surely as you are your child's first and most influential teacher,

your child's ideas about education and its significance begin with you! You must be a *living* example of what you expect your children to honor and to emulate. Moreover, you bear a responsibility to participate actively in your child's education. You should encourage more diligent study and discourage satisfaction with mediocrity and the attitude that says "let it slide"; monitor your child's study; encourage good study habits; encourage your child to take more demanding rather than less demanding courses; nurture your child's curiosity, creativity, and confidence; and be an active participant in the work of the schools. Above all, exhibit a commitment to continued learning in your own life. Finally, help your children understand that excellence in education cannot be achieved without intellectual and moral integrity coupled with hard work and commitment. Children will look to their parents and teachers as models of such virtues.

To Students

You forfeit your chance for life at its fullest when you withhold your best effort in learning. When you give only the minimum to learning, you receive only the minimum in return. Even with your parents' best example and your teachers' best efforts, in the end it is *your* work that determines how much and how well you learn. When you work to your full capacity, you can hope to attain the knowledge and skills that will enable you to create your future and control your destiny. If you do not, you will have your future thrust upon you by others. Take hold of your life, apply your gifts and talents, work with dedication and self-discipline. Have high expectations for yourself and convert every challenge into an opportunity.

A Final Word

This is not the first or only commission on education, and some of our findings are surely not new, but old business

that now at last must be done. For no one can doubt that the United States is under challenge from many quarters.

Children born today can expect to graduate from high school in the year 2000. We dedicate our report not only to these children, but also to those now in school and others to come. We firmly believe that a movement of America's schools in the direction called for by our recommendations will prepare these children for far more effective lives in a far stronger America.

Our final word, perhaps better characterized as a plea, is that all segments of our population give attention to the implementation of our recommendations. Our present plight did not appear overnight, and the responsibility for our current situation is widespread. Reform of our educational system will take time and unwavering commitment. It will require equally widespread, energetic, and dedicated action. For example, we call upon the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, Science Service, National Science Foundation, Social Science Research Council, American Council of Learned Societies, National Endowment for the Humanities, National Endowment for the Arts, and other scholarly, scientific, and learned societies for their help in this effort. Help should come from students themselves; from parents, teachers, and school boards; from colleges and universities; from local, State, and Federal officials; from teachers' and administrators'' organizations; from industrial and labor councils; and from other groups with interest in and responsibility for educational reform.

It is their America, and the America of all of us, that is at risk; it is to each of us that this imperative is addressed. It is by our willingness to take up the challenge, and our resolve to see it through, that America's place in the world will be either secured or forfeited. Americans have succeeded before and so we shall again.

Appendix B To Defendants' Memorandum In Support Of Motion For Partial Summary Judgement

BOARD OF EDUCATION

THOMAS R. WATKINS, President
Hampton

DR. MARK FRAVEL, JR.
CHESAPEAKE

DR. ALLIX B. JAMES
Richmond

W. L. LEMMON
Marion

MRS. MARGARET S. MARSTON
Arlington

H. RONNIE MONTGOMERY
Jonesville

MRS. AVIS W. PRINGLE
Bassett

HENRY W. TULLOCH
Waynesboro

KENNETH S. WHITE
Lynchburg

DR. S. JOHN DAVIS
Superintendent of Public Instruction and
Secretary to the Board

Standards of Quality
FOR
PUBLIC SCHOOLS IN VIRGINIA

ENACTED
BY
THE GENERAL ASSEMBLY OF VIRGINIA, 1982

Whereas, Section 2 of Article VIII of the Constitution of Virginia provides that standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly; and

Whereas, the goals of public education in Virginia are to aid each pupil, consistent with his or her abilities and educational needs, to:

1. Develop competence in the basic learning skills;
2. Progress on the basis of achievement;
3. Qualify for further education and/or employment:
4. Develop ethical standards of behavior and participate in society as a responsible family member and citizen;
5. Develop a positive and realistic concept of self and others;
6. Enhance the beauty of the environment;
7. Respond to aesthetic experiences through the arts;
8. Practice sound habits of living and personal health;
9. Acquire a basic understanding of and an appreciation of the free enterprise system and:

Whereas, the Board of Education has prescribed such standards for the 1982-1984 biennium; now, therefore.

Be it enacted by the General Assembly of Virginia:

1. §1. The standards of quality for the school divisions in the Commonwealth for the 1982-1984 biennium shall be:

1. BASIC SKILLS

A. The General Assembly and the Board of Education believe that the fundamental goal of the public schools of this Commonwealth must be to enable such student to master certain basic skills necessary for success in school and for a productive life in the years beyond. Therefore, each school division shall give the highest priority to developing basic skills to the best of each student's ability. There shall be concentrated effort in the primary grades (kindergarten through grade three) and intermediate grades (four through six). Remedial work shall begin for low-achieving students at all grade levels upon identification of their needs.

B. The program of instruction in primary and intermediate grades in each school division shall include the minimum skills objectives in reading, communications (with emphasis on writing, grammar, listening, and speaking), and mathematical skills which are appropriate for each child and which should be achieved or exceeded in the primary and intermediate grades.

C. The program of instruction in grades 7 through 12 shall assist students in developing at least minimum competence in the following areas:

1. Reading, writing, and speaking;

2. Mathematical concepts and computations;

3. Essential skills and concepts of citizenship, including knowledge of history and government, necessary for responsible participation in American society and within the world community;

4. Knowledge and skills needed to qualify for further education and/or employment.

Special emphasis shall be given to instructional activities which improve the reading, writing, speaking, and mathematical skills of students.

D. 1. To receive a standard diploma from a public high school, a student shall earn the units of credit prescribed by the Board of Education and attain minimum competence in the areas established under Standard 1-C. Attainment of reading and mathematics competencies established under Standard 1-C shall be demonstrated by means of tests prescribed by the Board of Education. Attainment of competencies in the other areas established under Standard 1-C shall be demonstrated to the satisfaction of local authorities through performance-related assessment.

2. To receive a special diploma from a public high school, a student shall be identified as handicapped, complete the units of credit prescribed by the Board of Education, and complete the requirements of the individualized education program. Handicapped students shall always have the opportunity to take competency tests.

3. To receive a certificate, a student shall complete a prescribed course of study as defined by the local school board. However, all students who have earned the units of credit required by the Board of Education and have not passed the competency tests shall be encouraged to retake and pass the minimum competency tests in order to receive a diploma.

4. On exiting from the public schools, all students who have received the units of credit required by the Board of Education or who, if identified as handicapped, have completed an individualized educational program but have not qualified for a diploma under sections 1 and 2 above, shall receive a certificate.

2 TESTING AND MEASUREMENT

A. Each school division shall provide the classroom teacher with methods to assess the progress of individual

students in attaining basic skills. For grades 1 through 6 such assessment shall include, at least annually, criterion-referenced tests developed or approved by the Department of Education to measure the progress of each student toward achieving the educational objectives established under Standard 1-B.

B. Each school division shall administer annually normative tests prescribed and provided by the Board of Education to assess the educational progress of students at selected grade levels.

C. Each school division shall administer competency tests prescribed and provided by the Board of Education to those students desiring to earn a standard diploma. The tests shall be designed to measure minimum competence in reading and mathematics established under Standard 1-C.

3 CAREER PREPARATION

The General Assembly and the Board of Education believe that the ultimate goal of public education must be to enable each student, upon leaving school, to continue successfully a program of advanced education and/or to enter the world of work. Therefore, each school division shall offer programs acceptable to the Board of Education that include:

1. Career guidance for all secondary students, including students with disabilities;

2. Academic and vocational preparation for students who plan to continue their education beyond high school;

3. Vocational preparation for students who graduate and those who leave school but do not plan to continue their formal education;

4. Experiences infused into the elementary and secondary curriculums which give students awareness and/or knowledge of careers (Career Education). These experi-

ences shall include some awareness of the consequences and implications of leaving school without marketable skills.

4 EDUCATION OF HANDICAPPED STUDENTS

Each school division shall have a program, acceptable to the Board of Education and consistent with state and federal law, for early identification of students who may need special education. After handicapping conditions have been identified and individualized education programs have been specified, such students shall be provided, at public expense, with appropriate instruction acceptable to the Board of Education.

5 EDUCATION OF GIFTED AND TALENTED STUDENTS

A. Each school division shall conduct a program acceptable to the Board of Education for the early identification of gifted and talented students.

B. Each school division shall offer differentiated instructional opportunities in accordance with guidelines of the Board of Education for identified gifted and/or talented students.

C. Students who participate in post-secondary programs before graduating from high school, whether academic or vocational, shall be awarded appropriate course credit and/or high school diplomas upon satisfactory completion of the advanced instruction in accordance with regulations prescribed by the Board of Education.

6 ALTERNATIVE EDUCATION

A. Each school division shall offer educational alternatives for students whose needs are not met in programs prescribed elsewhere in these standards. In accordance with guidelines established or approved by the Board of Education, these alternatives shall provide educational choices for students who have varying interests and abilities and

shall assist them in achieving the knowledge, skills, and attitudes specified in the goals of public education in Virginia.

B. Students enrolled in alternative education programs conducted by school divisions shall be counted in average daily membership (ADM) in accordance with regulations of the Board of Education.

7 RESPONSIBLE STUDENT CONDUCT

Public education should be conducted in an atmosphere conducive to learning, free of disruption and threat to person or property, and supportive of individual rights. Therefore, each school board shall adopt standards which shall govern student conduct and attendance in its locality and shall include these standards in the local school board policy manual.

8 PERSONNEL

A. Each school division shall employ with state and local basic, special education, and vocational education funds a minimum of 54 certified instructional personnel (full-time equivalent) for each 1,000 students in average daily membership; 48 of such full-time equivalent instructional positions shall be funded from basic school aid.

B. Certified instructional personnel employed by a school division shall be assigned in such a way as to result in a divisionwide ratio of pupils in average daily membership to full-time equivalent teaching positions in grades K-6 which is not greater than 25 to 1 (excluding special education teachers, principals, assistant principals, counselors, and librarians). The maximum number of pupils in average daily membership for each certified teacher in any K-3 class shall not exceed 30 students. If the average daily membership in any kindergarten class exceeds 25 pupils, a full-time teacher's aide must be assigned to the class.

For good cause shown, the Board of Education is authorized to grant a waiver from the requirements of this standard, not to exceed one year's duration. A school division shall not be considered in violation of this standard pending timely application for a waiver.

C. To assist low-achieving students in the primary grades, school divisions with 25 percent or more of their fourth-grade level shall assign additional instructional personnel to grades K-3. For this purpose, eligible school divisions shall receive state funding in addition to basic aid to support 50 full-time equivalent instructional positions for each 1,000 students in average daily membership during the 1982-1984 biennium.

The Board of Education shall monitor the expected improvement in achievement of students in school divisions which qualify for additional state funds under this provision.

D. To assist low-achieving eighth- and/or ninth-grade students, school divisions shall assign additional instructional personnel to assist those who are identified as being three or more years below grade level. State funding in addition to basic aid shall be provided for this purpose and shall be distributed on the basis of the number of students needing additional help.

The Board of Education shall monitor the expected improvement in achievement of students in school divisions which qualify for additional state funds under this provision.

9 STAFF PREPARATION AND DEVELOPMENT

A. School divisions shall comply with certification requirements adopted by the Board of Education.

B. Each school division shall provide a program of professional development for teachers under guidelines

provided by the Board of Education. This program shall be designed to help all teachers increase proficiency in discharging their responsibilities.

C. Each school division shall have a program of professional development for administrative personnel. This program shall be designed to increase proficiency in performing responsibilities related to school management and instructional leadership.

10 ACCREDITATION AND SCHOOL EVALUATION

A. Each school division shall maintain schools which meet accrediting standards adopted by the Board of Education.

B. For good cause shown, the Board of Education is authorized to grant a waiver from the requirements of this standard. A school division shall not be considered in violation of this standard pending timely application for a waiver.

C. All accreditation reports shall be open for public inspection.

11 PLANNING AND PUBLIC INVOLVEMENT

Each school division shall involve the staff and community in revising and extending biennially long-range school improvement plan covering a period of at least five years. This plan shall be approved by the local school board and shall be available for inspection at the time of administrative reviews conducted by the Department of Education. This plan shall include:

1. The measurable objectives of the school division;

2. An assessment of the extent to which the objectives are being achieved, including follow-up studies of former students;

3. A forecast of enrollment changes and a plan for managing those changes;

4. An assessment of the needs of the school division;

5. An evaluation of the appropriateness of certain regional services, in cooperation with neighboring divisions, and a plan for implementing such regional services when appropriate;

6. Strategies for achieving the objectives of the school division;

7. Evidence of community participation in the development of the long-range improvement plan.

A report on the extent to which the measurable objectives were achieved during the previous two school years shall be made to the local school board and to the public by November of each odd numbered year. Deviations from the plan shall be explained.

12 POLICY MANUAL

Each school division shall maintain and follow an up-to-date policy manual which shall include, but not be limited to:

1. Valid copies of Article 3 of Chapter 15 of Title 22.1 of the Code of Virginia concerning grievances, dismissal, etc., of teachers and the implementation procedure prescribed by the General Assembly and the Board of Education;

2. A system of two-way communication between employees and the local school board and its administrative staff, based on guidelines established or approved by the Board of Education, whereby matters of concern can be discussed in an orderly and constructive manner;

3. A cooperatively developed procedure for personnel evaluation appropriate to tasks performed by those being evaluated;

4. A policy for the selection and evaluation of all instructional materials purchased by the school division, with clear procedures for handling challenged controversial materials;

5. The standards of student conduct and attendance developed by the locality and procedures for enforcement.

An up-to-date copy of the school division policy manual shall be kept in the library of each school in that division and shall be available to employees and to the public.

§ 2. The standards of quality prescribed above shall be the only standards of quality required by Section 2 of Article VIII of the Constitution of Virginia.

§ 3. School divisions providing programs and services, as provided in the standards of quality prescribed above, with state basic and local funds may be required to provide such services and programs only to an extent proportionate to the funding therefor provided by the General Assembly.

§ 4. Notwithstanding any other provision of law, the Board of Education shall have authority to seek school division compliance with the foregoing standards of quality. When the Board of Education determines that a school division has failed or refused, and continues to fail or refuse, to comply with any such standard, the Board shall notify the Attorney General. It shall be the duty of the Attorney General to file, in the name of the Board of Education in the circuit court having jurisdiction in the school division, a petition for a writ of mandamus directing and requiring compliance with such standards by the appropriate party or parties defendant.

§ 5. That if any clause, sentence, paragraph, subdivision, section, or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence,

paragraph, subdivision, section or part thereof directly involved in the controversy in which the judgment shall have been rendered.

2. That Chapter 667 of the Acts of Assembly of 1980 and Chapter 553 of the Acts of Assembly of 1981 are repealed.

PLANNING AND MANAGEMENT OBJECTIVES

The following planning and management objectives were adopted by the Board of Education to complement the standards. They give direction for individual schools and teachers in their efforts to provide quality education in Virginia.

INDIVIDUAL SCHOOL MANAGEMENT

The goals of education in Virginia require that each school establish a stimulating learning environment in which a variety of professional services are available to students, according to their needs. To this end, each school division should require the school principal to be responsible for instructional leadership and effective school management focused on the achievement of individual students. It should be the duty of the principal to:

A. Maintain an atmosphere of mutual respect and courtesy in the school;

B. Provide students with the time they need on tasks by protecting instructional time from interruptions and intrusions;

C. Limit the scope of the school day to teaching and learning activities;

D. Monitor instruction and evaluate its quality through:

1. Establishment of specific and mutually developed objectives for each teacher;

2. A systematic program of classroom observation and follow-up consultation with the individual teacher;

3. Professional assistance, in-service training, and other support based on the needs of teachers;

4. Analysis and use of data on pupil achievement.

E. Prepare and follow a biennial school plan which is consistent with the division-wide long-range plan and which is approved by the divisions superintendent;

F. Use the resources of the community and involve parents and citizens in:

1. Evaluating the school program;

2. Developing the biennial school plan;

3. Volunteer services in the school;

4. Programs of supplemental instruction or enrichment.

G. Maintain a school handbook of policies and procedures which includes which includes the school division's standards of student conduct and procedures for enforcement, along with other matters of interest to parents and students;

H. Recognize and reward students' academic achievements.

The evaluation of principals required by Standard 12 should include an appraisal of the extent to Which these duties, as well as others which may be specified locally,, have been fulfilled.

CLASSROOM PLANNING AND MANAGEMENT

The prime ingredient of a successful education program is effective classroom instruction. The school division should recognize each teacher as a professional responsible for guiding the development of children and youth and should

require each teacher to implement the standards of quality and other state and local standards as they apply to individual teaching assignments. It should be the duty of each teacher to:

A. Maintain an atmosphere of mutual respect and courtesy in the learning environment;

B. Provide a personal model for effective communications through language usage, grammar, and spelling;

C. Establish daily teaching objectives which:

   1. Identify the learning expected of students;

   2. Keep students engaged in learning tasks;

   3. Allow the teacher to spend a majority of time in direct teaching activities.

D. Provide for individual differences through the use of varied materials and activities suitable for students with different interests and abilities;

E. Assess the progress of students and report to students and parents by:

   1. Evaluating students' work promptly and constructively;

   2. Certifying whether each student has mastered applicable learning objectives.

The evaluation of teachers required by Standard 12 should include an appraisal of the extent to which these duties, as well as others which may be specified locally, have been fulfilled.

[EXCERPTS FROM TRIAL TRANSCRIPTS]

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
DIVISION I

VERNELLE LIPSCOMB

Plaintiff

v.

RICHMOND NEWSPAPERS, INC., and CHARLES COX

Defendants

TRANSCRIPT OF PROCEEDINGS

August 8-12, 1983

BEFORE: The Honorable Willard Walker, Judge

APPEARANCES:

John H. OBrion, Esquire and
Kenneth Warren, Esquire
BROWDER, RUSSELL, MORRIS & BUTCHER
Counsel or the Plaintiff

Alexander Wellford, Esquire and
David Kohler, Esquire
CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
Counsel for the Defendants

• • • •

[Excerpt of Testimony of Vernelle Lipscomb]

A I majored in English.

Q What was your first teaching position after you graduated from Morgan State?

A My first teaching position was as a long-term substitute at Benjamin Briggs in Richmond.

Q And following substituting you began teaching where?

A Jackson Burley High School, Charlottesville, Virginia.

Q Did you teach at Maggie Walker High School?

A Yes, I did.

Q Could you give us the year you started there and the year you ended at Maggie Walker?

A I started teaching at Maggie Walker in 1959 and I taught there until integration occurred in 1971. Then I went to Thomas Jefferson High School and I'm currently there now.

Q You have been at Thomas Jefferson since 1971?

A Yes.

Q Now have you taken additional educational courses since you graduated from Morgan State and tell the jury in general what they are and what they consist of?

A I have taken courses in English, education courses, they were taken at the University of Virginia. These were courses taken towards a Master's degree in education in the teaching of English. I did my Master's degree at the University of Virginia in education and the teaching of English. Thereafter, I pursued courses in counseling. I have earned 22 hours towards a Master's degree in that.

Q Now you have taught since 1956, is that correct?

A Yes.

Q Could you estimate for us the number of students that you have taught since 1956?

A I have taught roughly two thousand six hundred. From two thousand six hundred to three thousand students.

Q What kinds of classes have you taught, at what grade levels and what subject matter?

A I have taught from grades nine through twelve in English courses, all phases, one through five. Five means honors courses.

Q Was that true at Maggie Walker and also at Thomas Jefferson those grades levels and those curriculum levels in grammar and literature and English?

A Yes.

Q In the course of your teaching practice since 1956, could you tell us some of the circumstances that bring you into contact with parents of the students you teach?

A I have been in contact with parents on several and varied occasions. All were not related to academic problems. Some were personal problems. Some were concerned with home problems, so all of them were not academically concerned. There were all types of problems.

Q Did these include parent-teacher conferences?

A Yes.

Q How about phone calls from parents?

A Yes, I have conferred with parents over the phone. I have written letters to them. We have communicated through letters and phone calls and I have spoken to them in person. So I have contacted parents or have been in contact with parents in many ways and because of many reasons.

Q Would you be able to estimate the number of parents you have been in contact with because you have been a teacher of the student or a child of theirs? Is there any way you can put a number on it? It is all right if you can't, but did you have any estimate?

A Roughly about twenty-five parents.

Q And how about—these are conferences? Have you dealt with more parents just having conferences?

A Oh, yes, they were not as I said before, they were not always academically or problem-related conferences. They were just conferences—Sometimes parents felt I could reach their students, their children better than they could and sometimes it did work.

• • • •

[Motion of Plaintiff to Reconsider Public Official Determinatation]

MR. OBRION: At this time we would like to renew our request for a reconsideration of her status as a public official and would suggest to the Court, and I will not re-argue what I had at pre-trial, but I want to read into the record some quotes from Artic Company Limited vs Loudon Times Mirror 624 F. 2d. 518, quoting a public official designation.

"The 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have substantial re-

sponsibility for or control over the conduct of governmental affairs.

"Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, the New York malice standards apply."

"It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the New York Times malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation."

"The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."

I'd like to cite General Products versus Meridith with which Mr. Wellford is very familiar already in which Judge Merhige makes inquiry into the public official dichotomy, and I think the test given there would conclude Ms. Lipscomb was a private plaintiff, and there are others we brought up during the pre-trial conference.

THE COURT: Any response, Mr. Wellford?

MR. WELLFORD: No, Your Honor; I think we argued at length and I think the rule recognized Ms. Lipscomb as a schoolteacher.

THE COURT: That's correct and the ruling is the same, that she is determined by me to be a public official. Now you all brought up, and the objection is noted to that, you all brought up yesterday, I don't know if we ever concluded all this, counsel's motion to amend the Bill of Particulars.

* * * *

[Trial Court's Ruling on the Defendant's Motion To Strike The Plaintiff's Evidence]

THE COURT: No, I slept well but it didn't give me cause one way or the other. I usually cross bridges once and that is usually ample.

The Court is mindful, and I think perhaps those who are hearing what I say should be mindful, because this thing can get so contorted, mindful of the necessity of recognizing one of the guarantees of protections of the Bill of Rights as being freedom of the press.

You probably get more attention to freedom of the press than some of the other rights do. Frequently rights run up against one another.

We also develop from time to time the fair trial-free press as both guaranteed under constitutional guidelines, and no one wants to take away the constitutional guidelines, least of all me, nor do I have the power to do so.

Therefore when you are talking in terms of the chilling effect on the news media in writing articles, one must be careful in doing things that will impinge upon that freedom. But it is not an unbridled freedom and no freedom is. Some writers and some writers of opinion and some writers of articles seem to think all of the rights they have, particularly their rights, are unbridled rights. No one has unbridled rights. The statement is as true today as it ever was: "That my right to swing my fist ends where your nose begins."

That is still true. You don't holler "fire" in a crowded theatre under the province of freedom of speech.

Not that the facts have been decided in this case; they have not. The facts are for the jury, not for me to decide, and I don't expect to. But on the facts presented, and there is ample evidence of this beyond any question of clear and convincing or anything else, there is plenty of evidence. I'm not saying it is so, but there is plenty of

evidence to justify to this or any jury that the statements made in this article are in fact false, and not only are they false but they are defamatory; they tend to hurt one in their business or trade or occupation. So we start from that premise that we have statements being made here that are wrong.

The protection that the newspaper seeks to have is, as the employer and Mr. Cox has as the author of these false statements. Here again I am not categorizing it as true or false, I am simply saying what the evidence at this stage would allow the jury to find.

What they say is under the New York Times constitutional malice, actual malice, New York Times malice, whatever you want to call that phrase, they do not have to be accountable unless the evidence fairly viewed by the Court conjured a clear and convincing burden of proof.

That is what we are talking about here a burden of proof that would enable the jury to gleen through that evidence to determine that the statements were made with reckless disregard for whether they were true or false and this is the issue. I don't want anyone to think I'm ruling on something, or deciding the question of whether or not Mr. Cox did or didn't do something because that isn't my function.

It's a rule on the law and it is determining whether the evidence as it now stands rises high enough to overcome a legitimate burden that is put there to protect the newspapers' right of freedom of the press, and to give them the right to comment on public matters on things they are concerned with, in particular, like a public figure which I have ruled Ms. Lipscomb is, and that is where we are at this particular time.

And I rule the evidence does rise to that level and the jury may so infer. They may not, but I think the evidence is there on the whole. I'm not going to disect it, I'm not

going to go down item by item on the article. I don't think I need to. I think the evidence is there from which a jury might reasonably conclude by a clear and convincing burden of proof that these statements were published with reckless disregard of whether or not they were true or false.

Now on the question of punitive damages, however, I do not believe that the punitive damages necessarily flow against both defendants, and I rule they do not on this evidence. I strike the punitive damage claim against the newspaper.

In order for the newspaper to be liable for compensatory damages or an act of its employee for whom they must act, since that person is acting in their interests and acting in their employment, they need only be the employer, and nothing more. But to be held responsible for plaintiff, and that to be punitive damages they must do something, they must individually be guilty of some ill will or spite or something that would be so reckless as to disregard the rights of Ms. Lipscomb as to hold them accountable in the case, or they must have knowingly authorized or ratified an act of that nature on behalf of the employee.

I have found no evidence to support that whatsoever, that the newspaper had any idea that the statements may have been—the article may have been put together with a reckless disregard of this falsity, and therefore punitive damages may not lie against the newspaper defendant but may lie against the individual defendant. And the objections of both sides as they may be appropriate are noted for the reasons I have already stated by counsel.

Are you all ready to proceed?

NOTE: Back in open court, jury present at 4:10 p.m.

* * * *

[Excerpt from Trial Courts Instruction of the Jury]

Your verdict must be based on the facts as you find them and on the law as contained in all of these instructions:

The issues in the case are:

(1) Is a statement of fact concerning the plaintiff in the article dated August 16, 1981 defamatory?

(2) Is such statement of fact false?

(3) Did the defendant Cox write such statement of fact with reckless disregard of whether it was true or false?

(4) If the plaintiff is entitled to to recover what's the amount of her compensatory damages?

(5) If the plaintiff is entitled to recover, what is the amount of her punitive damages against the defendant Cox?

* * * *

Reckless disregard of whether a statement in fact is true or not is a state of mind. There must be clear and convincing evidence when Mr. Cox wrote the newspaper article he had serious doubts in his mind the statements in the article were true or that there was a high awareness in his mind that the statements in the article were probably false.

Although the defendants are not responsible for false defamatory statements made by other people, nonetheless, if defendants repeat in print such statements by quote or otherwise, then they can become liable to the plaintiff, provided plaintiff has proved by clear and convincing evidence that defendant Cox acted with reckless disregard as to whether the statements by other people were true or false.

* * * *

[Jury's Verdict]

Open Court 4:50 p.m.

THE COURT: Ladies and gentlemen of the jury, have you agreed upon a verdict?

MR. HORNE: Yes, Your Honor.

THE COURT: Mr. Horne, it looks like they have appointed you the foreman, I believe, because you are holding the paper. Would you read the verdict to the parties?

MR. HORNE: We, the jury, on the issues joined, find for the plaintiff against the defendant Cox and Richmond Newspapers and award her damages in the amount of one million dollars.

We, the jury, on the issues joined, find in favor of the plaintiff against the defendant Cox and award the plaintiff punitive damages in the amount of forty-five thousand dollars.

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND, DIVISION I

VERNELLE M. LIPSCOMB, *Plaintiff,*	)	
v.	)	CASE NO.: LF-1112
RICHMOND NEWSPAPERS, and CHARLES E. COX, *Respondents.*	)	

Defendants' Post-Trial Motions

1. Defendants, Richmond Newspapers, Inc., and Charles E. Cox, move the Court to set aside the verdicts as contrary to the law and evidence and enter final judgment for defendants on the grounds that the evidence fails to satisfy the applicable standard of liability.

2. Defendants move the Court to set aside the verdicts as contrary to the law and evidence and grant a new trial on the grounds that the verdicts were actuated by passion and prejudice; that the verdicts are not supported by the evidence; and that the instructions to which objections were raised by defendants are contrary to law.

3. Defendants move the Court to order a remittitur of the verdicts on the grounds that they are excessive.

Richmond Newspapers, Inc.
and Charles E. Cox
By Counsel

/s/ David C. Kohler
Alexander Wellford
David C. Kohler
Christian, Barton, Epps,
Brent & Chappell
1200 Mutual Building
909 E. Main Street
Richmond, Virginia 23219

CERTIFICATE

I certify that a true copy of the foregoing Defendants' Post-Trial Motions was mailed on the 16th day of August, 1983, to John H. OBrion, Jr., Esquire, and Kenneth X. Warren, Esquire, Browder, Russell, Morris & Butcher, 1200 Ross Building, Richmond, Virginia 23219, counsel to the plaintiff herein.

/s/ David C. Kohler
David C. Kohler

LETTER OPINION OF CIRCUIT COURT OF CITY OF RICHMOND RULING ON POST-TRIAL MOTIONS

Circuit Court

of the

City of Richmond

WILLARD I. WALKER
JUDGE

December 26, 1983

JOHN MARSHALL COURTS BUILDING
800 EAST MARSHALL STREET
RICHMOND, VIRGINIA 23219

Messrs. John H. OBrion, Jr.,
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Browder, Russell, Morris & Butcher
1200 Ross Building
Richmond, VA 23219

Messrs. Alexander Wellford,
David C. Kohler
Christian, Barton, Epps, Brent & Chappell
1200 Mutual Building
Richmond, VA 23219

Gentlemen:

Re: Case No. LF-1112
Vernelle M. Lipscomb
v. Richmond Newspapers, Inc. and
Charles E. Cox

This case is before the court on defendants' motion to set aside a jury verdict in favor of the plaintiff in the amount of one million dollars compensatory damages against both defendants, and forty-five thousand dollars punitive damages against the defendant Cox.

Defendants' argument is predicated on two fundamental objections: (1) That the evidence is insufficient, as a matter

of law, to allow the jury to find "constitutional malice" on the part of the defendants, and (2) that the verdict on compensatory and punitive damages is excessive.

As was true during the course of the trial, and for the reasons then stated by the court and by plaintiff's counsel, I conclude there was sufficient evidence to find "constitutional malice" in the conduct of defendant Cox. While it seems most doubtful that the evidence would allow an inference that Cox knew his statements were false, there is ample evidence from which a jury could infer that he acted with reckless disregard for whether the statements were true or false. Stating it differently, there is evidence that Cox knew there was a high probability of falseness of the statements and that he nonetheless published the statements because he did not care whether the statements were true or false.

As to damages, however, I conclude that the compensatory award is clearly excessive and shocks the conscience of the court. I do not reach this conclusion on the basis of who the plaintiff is. It would not matter who was the individual, on the evidence before the court. The award simply bears no reasonable relationship to the evidence of damages in the record; and as to anyone, I would set this verdict aside.

I will briefly review the evidence. The statements were published over a very broad area (the sale area of defendant Newspapers), and the statements appeared prominently, with pictures, in a Sunday edition of the newspaper shortly before the beginning of a school year; but no one, other than plaintiff, gave any evidence that the statements had caused them to question the ability or integrity of the plaintiff or to regard her differently in any way. In fact, the evidence from all witnesses—co-workers, students, superiors, friends, etc.—was that they did not believe the statements, that they felt no ill will toward the plaintiff, and that they supported her and told

her so. There is not a shred of evidence of any actual out-of-pocket loss or physical or mental illness resulting from the publication. What we have is a statement of the plaintiff that she was embarrassed and humiliated, that she *feared* other people, such as her coworkers or superiors or the parents of school children, would think less of her, that she found it difficult to deal with anyone without this fear, that her church and social activities were restricted by her because of this fear, that despite reassurances, she continues to have these fears, and that her desire to work and her ability to function at work had been affected, although her actual job had not been terminated or threatened.

I do not suggest that the jury was motivated by any bias or improper motive in making its decision; however, the size of the verdict alone compels me to conclude that the jury misconceived the law of the case, or that they were inflamed by factors that would properly be addressed only on the issue of punitive damages. In that connection, I find no impropriety in the forty-five thousand dollar award of punitive damages.

Accordingly, I make the following rulings. The case was properly submitted to the jury on proper instructions. The punitive damage award against the defendant Cox is proper. The compensatory damage award is excessive. Therefore, pursuant to Code of Virginia § 8.01-383.1, I require the plaintiff to remit nine hundred thousand dollars of her compensatory damage recovery, or submit to a new trial on all issues. I do not feel that the liability and damage issues are so clearly divided that a new trial on damages alone would be proper.

Counsel for the plaintiff will please promptly inform me whether or not his client will accept the remittitur under protest or if she wishes to proceed to a new trial.

If an appeal is to be the next step in this case, then counsel for both sides will please inform me as to whether

or not the transcript of the proceedings in this case can be made a part of the record pursuant to the provisions of Rule 5:9 without the problems attendant to formal presentation.

Very truly yours,

Willard I. Walker

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I
February 22, 1984

VERNELLE M. LIPSCOMB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.:
	)	LF-1112
RICHMOND NEWSPAPERS, INC.,	)	
	)	
and	)	
	)	
CHARLES E. COX,	)	
	)	
Defendants.	)	

FINAL ORDER

Came again the parties, by counsel, upon Motions by the defendants to set aside the jury's verdicts of August 12, 1983 as contrary to the law and evidence, or in the alternative to set aside the verdicts and to grant a new trial, or in the alternative to order a remittitur of the verdicts; and upon Motion of the plaintiff to enter judgment upon the verdicts.

Having reviewed the Memoranda of the parties and having heard the arguments of counsel, and for the reasons set forth in a letter opinion of the Court dated December 26, 1983, which is incorporated herein, it is ORDERED as follows:

1. The Motion of defendants to set aside the verdicts and enter final judgment for defendants is denied to which action the defendants, by counsel, object;

2. The Motion of the defendants to set aside the verdicts as contrary to the law and evidence and grant a new trial is denied, to which action the defendants, by counsel, object;

3. The Motion of the plaintiff for entry of judgment on the verdicts is denied, to which action, the plaintiff, by counsel, objects;

4. The Motion of defendant Cox for a remittitur of punitive damages is denied, to which action defendant Cox, by counsel, objects;

5. The Motion of defendants for remittitur of compensatory damages is granted as set forth in the Court's letter of December 26, 1983, to which action the plaintiff, by counsel, objects.

Having been advised by plaintiff that she will accept, under protest, the remittitur of compensatory damages to One Hundred Thousand and no/100 ($100,000.00) Dollars, pursuant to §8.01-383.1 of the Code of Virginia, it is ORDERED and adjudged that plaintiff recover and have judgment against the defendants, Richmond Newspapers, Inc. and Charles E. Cox, jointly and severally, in the sum of One Hundred Thousand and no/100 ($100,000.00) Dollars and against defendant, Charles E. Cox the sum of Forty-five Thousand and no/100 (45,000.00) Dollars as punitive damages together with interest as permitted by law from August 12, 1983 and her costs expended.

Pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, it is directed that transcripts of all proceedings in this matter are hereby made part of the record.

A Copy Teste:

IVA R. PURDY, CLERK

By /s/ Linda H. Brown
Deputy Clerk

ENTER:

Seen and Objections as Noted:

/s/ John H. Obrion, Jr.
Counsel for Vernelle M. Lipscomb

Seen and Objections as Noted:

/s/ David C. Kohler
Counsel for Richmond Newspapers, Inc. and Charles E. Cox

[ASSIGNMENTS OF ERROR FROM BRIEF OF PETITIONERS]

ASSIGNMENTS OF ERROR

1. The trial court erred in denying petitioners' motion to strike the evidence.

2. The trial court erred in refusing to set aside the jury's verdict and enter judgment for petitioners.

3. The trial court erred in refusing to order a new trial on all issues.

4. The trial court erred in submitting the entire article to the jury, thereby allowing it to predicate its verdict on statements that, as a matter of law, were not capable of defamatory meaning or were opinion.

5. The trial court erred in excluding the testimony of petitioners' expert witness.

[ASSIGNMENTS OF CROSS-ERROR FROM BRIEF OF RESPONDENT]

III. ASSIGNMENTS OF CROSS-ERROR

1. The trial court erred in holding, as a matter of law, that Miss Lipscomb, a public school teacher, was a "public official".

2. The trial court erred in holding that defendant Richmond Newspapers was not liable for punitive damages.

3. The trial court erred in ordering Miss Lipscomb to remit the substantial portion of her compensatory damages.

[EXCERPT FROM PETITIONERS' PETITION FOR REHEARING]

IN THE
SUPREME COURT OF VIRGINIA
At Richmond

Record No. 840737

RICHMOND NEWSPAPERS, INC.
AND CHARLES E. COX,

Petitioners,

v.

VERNELLE M. LIPSCOMB,

Respondent.

PETITION FOR REHEARING

This petition seeks a rehearing of the Court's holding that a public school teacher is not a public official in the context of her classroom activity, and that her performance as a teacher therefore is not subject to comment and criticism under the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It is respectfully submitted that the Court's analysis of this issue fails to consider recent authority of the United States Supreme Court which recognizes the school teacher as a potent force in the affairs of government. It is further submitted that by minimizing the power and responsibility of persons like teachers who implement governmental policy, as opposed to the power of those who fix the policy, the Court has established a precedent that will make it very dangerous for citizens of the Commonwealth to criticize the conduct of

those public employees whose positions are critical in the administration of governmental affairs.

* * * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 5th *day of* January, 1988.

Richmond Newspapers, Inc., et al., Appellants,

against Record No. 840737
Circuit Court No. LF-1112/84-333

Vernelle M. Lipscomb Appellee,

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 30th day of October, 1987 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy

Teste:
Patricia G. Davis
Deputy Clerk

No. 87-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHMOND NEWSPAPERS, INC.
and
CHARLES E. COX,

Petitioners,

v.

VERNELLE M. LIPSCOMB,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1636

RICHMOND NEWSPAPERS, INC.,
and
CHARLES E. COX,

Petitioners,

v.

VERNELLE M. LIPSCOMB,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

Respondent, Vernelle M. Lipscomb ("Lipscomb"), respectfully requests that this Court deny the petition of Richmond Newspapers, Inc., and Charles E. Cox seeking a writ of certiorari to review

the judgment the Supreme Court of Virginia entered in this case.

STATEMENT OF THE CASE

The newspaper article giving rise to this action appeared two weeks before the start of the school year in 1981 on the front page of the Sunday edition of the Richmond Times-Dispatch.[1]

Throughout these proceedings petitioners have claimed, as they do in their Petition to this Court, that the article was not about Lipscomb, but related to a matter of general and public concern - how parents handle problems with teachers. App. at

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1 The Richmond Times-Dispatch is known as "Virginia's State Newspaper" and has a circulation of more than 225,000.

69a-70a. Yet, of the 60,000 teachers in Virginia, only respondent was mentioned.

At the time of the article, Lipscomb had been a classroom teacher for 26 years, teaching over 2,600 students. Nearly all of her students acknowledged her to be an effective, but tough teacher, and many stated that the rewards and benefits of being in her class were not always fully appreciated by them until later, especially in college. App. at 96a-109a. She was described by her department head as "the English teacher's English teacher... every school should have a Ms. Lipscomb." App. at 93a.

The article contained numerous statements that the courts below have held to be defamatory falsehoods. That

issue is not before the Court. The article variously stated that respondent was unfit, ought to be barred from the classroom, was disorganized, erratic, forgetful, unfair, unreasonable, harsh, patronizing, humiliating, demeaning, and frequently tardy or absent from class.[2] Petitioners went on to state that Lipscomb hated bright students, made students cry by verbal excess and possessed an unsatisfactory and complaint-filled record. Petitioners have attributed the defamatory falsehoods published by them to four or five students brought to petitioner Cox by one of the parents. App. at 3a-8a.

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2 Copies of the article were filed with this Court at the time of filing of the Petition.

In response to petitioners' Motion for Partial Summary Judgment, the trial court ruled that Lipscomb was a public official solely "because she is a school teacher." App. at 73a.

When the case was tried in 1983, respondent made clear that she would challenge on appeal her designation as a public official. Without objection by the petitioners, Lipscomb proffered testimony that, in her 26 years of classroom teaching, she had never been interviewed by any reporter, never participated in the budget process, never supervised other employees, never made appearances before school boards or governing bodies, never participated in determining the policies of any school board. She was, simply put, a classroom teacher. App. at 86a-92a.

Following the dictate of Rosenblatt v. Baer, 383 U.S. 75, 84 (1966), to wit: lower courts are to determine who is a "public official" in accordance with "the purposes of a national constitutional protection," the Supreme Court of Virginia unanimously concluded that Lipscomb was not a public official and that the New York Times standard did not apply to her defamation action. App. at 9a-20a.

REASONS FOR DENYING THE WRIT

The Petition should be denied for the following reasons:

1. This Court has set clear guidelines for determining the status of public officials in order to allocate a higher standard of proof in libel suits. These guidelines do not suggest an

expansion to include all public employees who have a hand in implementing public policy.

2. Lower courts have been correctly reading and applying the guidelines of this Court for determination of public officials. A case by case review of each libel verdict is not feasible, and the media is reasonably protected by the Virginia standard applicable to private plaintiffs.

3. The guidelines for public official determination relate to control of government affairs, independent public interest in the employment position and the authority to influence resolution of public issues under discussion. The label of "public official" should not be extended to classroom teachers

merely because education is deemed to be an important government service.

4. The Supreme Court of Virginia has correctly applied the rationale of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). There is no basis to expand the public official label to all public employees who might exercise influence and control over the lives of others.

I

THIS COURT'S "PUBLIC OFFICIAL" OPINIONS ARE CLEAR: THOSE WHO IMPLEMENT, BUT DO NOT FORMULATE, GOVERNMENT POLICY ARE NOT PUBLIC OFFICIALS FOR PURPOSES OF ALLOCATING A HIGHER STANDARD OF PROOF IN DEFAMATION CASES.

Critical to the trial of any libel case is the determination of the plaintiff's status as public or private citizen. The determination is made for a limited and specific purpose: to

impose or not the New York Times standard of proof.[3] Imposition of the New York Times standard produces serious consequences for the defamation plaintiff, compelling this Court to recognize that the public person designation affords a strategic protection to the media. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

Petitioners' effort to expand the label of "public official" to anyone

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3 In cases involving public plaintiffs, the jury is instructed that plaintiff's burden is to prove, by clear and convincing evidence, that the defendant published a defamatory falsehood with knowledge that it was false or with reckless disregard of whether it was false or not. The Virginia Supreme Court has adopted ordinary negligence as the standard for private individuals. Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713, cert. denied sub nom., Fleming v. Moore, 472 U.S. 1032 (1985).

involved in implementing government policy distorts this Court's declarations in Gertz. That opinion noted that the New York Times standard clearly abridges legitimate state rights and exacts a high price from many deserving victims of defamatory falsehoods. But the public/private dichotomy is justified as an accommodation between the need for a vigorous press and the valid state purpose of permitting individuals to redress harm inflicted by defamatory falsehoods. As Mr. Justice Powell stated for the Court: "We would not lightly require states to abandon this purpose..." Gertz at 341.

Petitioners would have this Court believe that the rules for determining public official status are uncertain.

Yet, the Supreme Court of Virginia had no trouble in applying this Court's public official guidelines to reach a unanimous holding that a public school teacher, because of the fact of her employment, is not a public official for purposes of a libel suit.

The tracking of public official opinions from this Court reveals numerous characteristics of such positions. Yet none of the key cases even hint that the "public official" designation is to be imprinted on each and every person having a hand in implementing government policy.

There is no question that a person elected to office is a public official. The plaintiff in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), was an

elected Commissioner and had direct and exclusive supervision for the police and fire departments as well as other departments. While not elected, the plaintiff in Rosenblatt v. Baer, 383 U.S. 75 (1966), was the only supervisor of a county recreation and ski area and was directly responsible to the three elected County Commissioners in charge of all county government.

The important indicia for determining who is a public official were enunciated in Rosenblatt:

1. A public official must have substantial responsibility for the control and conduct of government affairs. 383 U.S. at 85;

2. A public official's position in government is one of significant importance and must clearly manifest an independent public interest in the qualifications and performance of the person who holds it. This independent interest must be entirely beyond and apart from the valid and strong public interest in the qualifications and performance of all government employees. Id. at 86;

3. A public official's position must be one that objectively would invite public scrutiny and discussion of the person

holding it - entirely apart from the scrutiny and discussion occasioned by any charges in controversy. Id. at 86, n.13;

4. A public official has the authority to influence significantly the resolution of the public issues under discussion. Id. at 85.

Unless the plaintiff is an elected official, Rosenblatt prescribes that defamation plaintiffs should not be labeled by groups according to the subject matter of their occupation. Petitioners argue that implementation of government policy should be the hallmark of a public official. However, that argument applies equally in the case of

any group of public employees whether in spheres of public health, finance, water and sewer or any other "important" government service. The public official determination does not turn on an arbitrary hierarchy of the relative importance of government services.

This Court in Gertz explained why a distinction is permitted between public and private plaintiffs in the first place.[4] Public officials and public figures have significantly greater access to channels of effective communi-

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4 One important grounds for making the initial distinction between public and private plaintiffs is that public officials have traditionally been cloaked with immunity or privilege against liability for defamatory words they utter in discharge of their public duties. New York Times at 282. No such protection exists for classroom teachers.

cation and a more realistic opportunity to counteract false statements. Secondly, public officials are deemed to have made a voluntary choice to involve themselves in the public arena and thus to expose themselves to greater public scrutiny. Gertz, 418 U.S. at 344.

These principles have no application to the 60,000 classroom teachers of Virginia. Whether a plaintiff is a home economics teacher in Norton, Virginia, a pre-school teacher in Highland County, Virginia (population 3,000), a teacher of computer science in Arlington, Virginia, or one of thousands of teachers in the Richmond public schools, all would be included under the rule proposed by petitioners. Classroom teachers, wherever located and however

qualified or experienced, would become public officials.

In urging expansion of the public official rule, petitioners cite no cases where courts have grappled with the public official designation for those who "implement" government policy. Predictably, confusion would abound in judicial determinations of when a position is part of the "implementation" of governmental policy. Are not all government employees, in some small measure, involved in implementing and carrying out public policy? See Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979) (public official cannot be thought to include all public employees).

Petitioners have packed their appendix with documents attesting to the importance of education. It follows, they say, that since teachers are a vital cog in the field of education, all teachers are public officials when defamed. This is an obvious attempt to return to the overruled notions of Rosenbloom ignoring the individual plaintiff's position in favor of a New York Times standard for any case involving matters of public or general concern. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

Under New York Times, Rosenblatt, and Gertz, the focus in determining plaintiff's status is clearly and properly on the plaintiff's employment position, the power of the position to

resolve public issues, the relationship of the position to the control and conduct of affairs of government, and whether the position is so unique that it invites public scrutiny apart from any particular controversy or issues. These standards, supplemented by the rationale of Gertz (access to media and voluntary choice to become a public official), set meaningful guidelines for courts charged with making the determination.

To introduce a rule requiring public official status for all who implement or carry out government policy would invite uncertainty where none presently exists.

II

LOWER COURTS ARE CORRECTLY APPLYING THE PUBLIC OFFICIAL GUIDELINES OF THIS COURT.

Before announcing a so-called "split" among state courts about the status of teachers as public officials, petitioners should read again the manifest statements of Mr. Justice Powell in Gertz, 418 U.S. 323 (1974).

In effecting the balance between needs of the press and the individual's right to redress harm to reputation, Mr. Justice Powell discussed the approach suggested by Mr. Justice Harlan in Rosenbloom, 403 U.S. at 63. Mr. Justice Harlan had urged a utilitarian approach, including scrutiny by this Court of every jury verdict in every libel case to ascertain whether

First Amendment values were transcended by the legitimate state purposes.

Mr. Justice Powell pointed out the unmanageable result of such an approach with the following caveat:

> Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

418 U.S. 323, 343 (1974).

Those state courts which have analyzed and applied Rosenblatt and Gertz have, in well-reasoned opinions,

inevitably found classroom teachers not to be public officials. See, e.g., Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984); True v. Ladner, 513 A.2d 257 (Me. 1986). Cases classified by petitioners as teacher/public official cases are, in fact, misidentified.

The Arizona case of Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978), does not help petitioners because it relied solely on the Illinois case of Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 739 (Ill. App. Ct. 1974). Basarich has been overruled in McCutcheon v. Moran, 99 Ill. App. 3d 421, 425 N.E.2d 1130 (Ill. App. Ct. 1981).

In McCutcheon, the Illinois court relied on Johnson v. Board of Junior

College District #508, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1975), which had noted that teachers in public schools, by that fact, are not public officials. The court held:

> We are unwilling to place the imprimatur of public official on a school teacher...[thus] exposing these individuals to a qualifiedly privileged assault upon his or her reputation.

425 N.E.2d 1130, 1133 (1975).[5]

An Arkansas case cited by petitioners is simply inapposite. Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973), was decided without benefit of Gertz which was decided one

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5 In like manner, Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978), has no value to petitioners because of its exclusive reliance on Basarich.

year later in 1974. Gallman contains no discussion of whether classroom teachers are to be labeled as public officials. As dean of the state law school and as a professor, plaintiff Gallman was held, for matters of public and general concern under Rosenbloom, to be a public official.

To include New York in their list, petitioners cite two cases. In Mahoney v. Adirondack Publishing Co., 123 A.D.2d 10, 509 N.Y.S.2d 193 (N.Y. App. Div. 1986), rev'd. on other grds., 71 N.Y.2d 31, 523 N.Y.S.2d 480 (1987), a high school football coach conceded at trial that he was a public figure; moreover, there was no issue on appeal of teachers as public officials.

In Deluca v. New York News, Inc., the court declined to determine the issue because plaintiff was no longer a school teacher performing the duties of the position at the time of occurrence of the matters reported. 109 Misc. 2d 341, 438 N.Y.S.2d 199 at 204 (1981).

Because of the caveat of Mr. Justice Powell and the weakness of the cases cited by petitioners, their plea for guidance from this Court (Petition at 10) should be viewed skeptically. In a similar vein, petitioners need not "guess" about the rules applicable to comments about school teachers. Petition at 10.

Petitioners are already reasonably protected in suits by private plaintiffs. In Virginia, the trial court is

required to make an initial determination that the defamatory statement makes substantial damage to reputation apparent. And, of course, plaintiff has the burden of proving falsity. Petitioners will have ample breathing space so long as they do not act negligently in failing to ascertain facts upon which a false and defamatory statement is based. Gazette, Inc., 229 Va. 1, 325 S.E.2d 713.

III

THE IMPORTANCE OF TEACHERS IN EDUCATION DOES NOT MAKE THEM PUBLIC OFFICIALS FOR DEFAMATION SUITS.

Petitioners seek a New York Times standard for libel plaintiffs whose positions in government are "extremely important." Petition at 12.

As discussed above, the entire exercise to classify libel plaintiffs is for the purpose of determining if the New York Times standard of proof is to apply. The public/private distinction has been recognized for what it is--a reasonable accommodation between the need for a vigorous press and the right of individuals to redress harm to reputation. See Section I.

No one, least of all the respondent, disagrees with the importance of the teaching profession. Teachers do influence the lives of their students, and it is very much a mutual experience for teacher and student. See App. at 81a-86a. (Respondent looked forward to going to school to be with her students and enjoyed their visits after

graduation to share their successes and express their gratitude.)

The attempt to borrow laudatory statements about education and teachers from other cases misses the mark. It does not affect the inquiry under Rosenblatt and Gertz to know that because of the vital role of teachers, a state's exclusion of aliens from teaching certification does not violate the Equal Protection Clause. Ambach v. Norwick, 441 U.S. 68 (1979). Nor does it assist the public official inquiry to know that Fourth Amendment rules apply to a lesser degree to public school students, owing to the "commonality of interests between teachers and their pupils," and that the typical teacher has an attitude of personal

responsibility for the students' welfare as well as for his education. New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring).

There are other cases where the value of education and the importance of teachers could be ascertained. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954) and cases cited in Ambach v. Norwick, 441 U.S. at 77 (1979). These non-defamation cases have nothing to do with the principles that animate the inquiry this Court has mandated for determination of public official status in defamation cases.

Petitioners assert that the Supreme Court of Virginia "forced" a limitation on Rosenblatt by observing the absence in the record of evidence that Lipscomb

influenced or controlled public affairs or school policy. Petition at 11.

The absence of such a showing was important, to be sure, but it was only one factor the Virginia Supreme Court considered in dealing with all of the guidelines from Rosenblatt and Gertz.[6]

Of greater importance to the Virginia Court was the lack of an independent public interest in Lipscomb's qualifications and performance beyond the public's general

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6 The Virginia Supreme Court was also impressed by the description in Gertz that public officials accept the consequences of involvement in public affairs, including the risk of closer scrutiny. But, as stated by the Virginia Supreme Court, "That is only one of the many matters a court must weigh in deciding whether a particular public employee is one classified as a 'public official' under the New York Times malice rule." App. at 13a-14a.

interest in the qualifications and performance of all teachers. App. at 20a.

Cases cited by petitioners do support strong public interest in the qualifications and performance of all teachers in public education. But petitioners have yet to address, at any level, the additional question of the public's independent interest in Lipscomb's qualifications and performance.

IV

THE VIRGINIA SUPREME COURT DID NOT MISINTERPRET GERTZ v. ROBERT WELCH, INC.

Petitioners claim that the Virginia Supreme Court erred in giving "significant weight" to Lipscomb's lack of access to the media. Petition at 14.

Further, say the petitioners, the lower court muddled the distinction between public figures and public officials. In all events, they conclude, the distinction is irrelevant and should be abandoned in favor of the following test: Does the plaintiff have power over the lives of citizens? If so, he is a public official. Petition at 15-16.

The use of Gertz by the Virginia Supreme Court was clear and correct. First of all, the Court acknowledged the guidance offered by Mr. Justice Powell in Gertz:

a. One characteristic of public officials is that they usually enjoy significantly greater access to the channels of

effective communication and, hence, have a more realistic opportunity to counteract false statements; and

b. An individual who decides to seek governmental office must accept certain consequences of involvement in public life including risk of closer public scrutiny. App. at 13a-14a.

But contrary to petitioners' claims, the court went on to say specifically:

> This is only one of the many matters a court must weigh in deciding whether a particular employee is one classified under the New York Times malice rule.

App. at 7a.

It is even more misleading to suggest that the Virginia Supreme Court has fused the public figure/public official distinction. Of course, it is irrelevant to the case at bar, since the issue was not, and indeed could not have been, raised about Lipscomb who never had public exposure of any sort.

But in footnote 2 the Virginia Supreme Court remarked unequivocally: "...different considerations determine whether a person is a 'public figure' or a 'public official' under the New York Times malice rule." App. at 14a.

In a sense, it is correct to say Gertz is a public figure case because that particular plaintiff provoked only a public figure inquiry. But the comments of Mr. Justice Powell about

public plaintiffs were in the conjunctive and pertained to public figures and public officials. 418 U.S. at 344.

Power to influence others, as a test, is no more deserving than the "policy implementation" test urged earlier in the Petition. Besides being unworkable, both tests are not-so-thinly disguised efforts to expand protection for the media at the expense of victims of defamatory falsehood.

The enlargement of the public official designation would be beneficial to the media, to be sure. But it would violate the existing "accommodation" between defamation victims and the media.

As Mr. Justice Powell stated so well:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.

Gertz at 341.

The Supreme Court of Virginia did not err in its reading and application of Gertz.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari to the Supreme Court of Virginia.

Respectfully submitted,

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A P P E N D I X

PRESENT: All the Justices

RICHMOND NEWSPAPERS, INC., et al

v. Record No. 840737 OPINION BY
JUSTICE HENRY H. WHITING

October 30, 1987

VERNELLE M. LIPSCOMB

FROM THE CIRCUIT COURT OF
THE CITY OF RICHMOND
Willard I. Walker, Judge

This action for defamation brought by a Richmond public school teacher, Vernelle M. Lipscomb ("Lipscomb"), against Richmond Newspapers, Inc. (the "newspaper"), a publisher, and its reporter, Charles E. Cox ("Cox"), arises out of the publication of a front-page article in the Richmond Times-Dispatch. The trial judge sustained a jury's award of $45,000 in punitive damages against Cox, but required a remittitur of $900,000 of a $1,000,000 compensatory

damage award against both defendants. We will affirm the reduced award of compensatory damages but reverse the award of punitive damages.

I. ISSUES

(1) Was Lipscomb, as a public school teacher, in that class of public officials which can only recover compensatory damages for defamation by establishing the constitutional malice described in the New York Times v. Sullivan, 376 U.S. 254 (1964)?

(2) If not, was negligent publication by Cox and the newspaper subsumed in the jury's finding of a publication with reckless disregard for the truth; and, if so, was the evidence in this case sufficient to support a finding of negligent publication?

(3) Was the evidence in this case sufficiently clear and convincing to support the jury's finding of publication by Cox with a reckless disregard for the truth, which Lipscomb must establish to recover punitive damages?

Collateral issues must also be resolved as to the admissibility of an expert's opinion on the standard of care, the obligation of a trial court to segregate potentially defamatory evidence from non-defamatory evidence in its instructions to the jury, and the size of the jury's verdict.

II. FACTS

The news article was in the Sunday newspaper a few weeks prior to the opening of school in the fall of 1981. The article identified Lipscomb by name

and said that certain parents and their children:

> charge that a Thomas Jefferson High School teacher is disorganized, erratic, forgetful, and unfair; that she returns graded papers weeks late and absents herself from the classroom for long periods; that she insists students stick to the rules, and flouts them herself. They say she demeans and humiliates students. The brighter they appear, the likelier they are to suffer at her hands, the parents protest.

One of Lipscomb's colleagues was quoted as saying that the teacher "might be out of her element in dealing with the students found in the honors course where most of the problems seem to have cropped up since the mid-1970's."

Dr. I. David Goldman, a physician and a teacher at the Medical College of Virginia and the father of one of Lipscomb's students, initiated the

contact with Cox. Goldman allegedly told Cox that the school's principal "has had enough complaints about Ms. Lipscomb's performance over the years to know that there was trouble."

Another parent, a minister, was quoted as saying that his son was:

> so unreasonably and harshly treated [that the parent] told both [the teacher] and her principal that she ought to be ousted from the classroom...[that] he remembers Ms. Lipscomb as "totally unbending, [a woman] of no leeway, no compromises...[she] was willing to 'settle for mediocrity' and 'conformity.' " [The minister also was alleged to have] told the school superintendent..."she is not fair, that she is hurting these kids." I told [the superintendent] "I will do all I can to get rid of her. She is bad for this system, bad for these kids."

The article referred to a third parent as "[s]ound[ing] a note heard often: that Ms. Lipscomb is inclined to

react in ways the students regard as irrational or harsh when her facts, judgment or authority are questioned. 'I think she has a bias against bright kids. Maybe she's afraid of them.' " A fourth parent described her child as one "with a long record of good grades [who] hits Ms. Lipscomb's class and winds up with a 'D.' "

The article quoted a student as saying, "She [Ms. Lipscomb] was patronizing, she was late for class, and she was missing from class a third of the time. When she was present she was so disorganized that few if any of [my] classmates understood what was expected of them. She didn't teach, I really learned nothing...her verbal excesses... caused...pain, I cried in class, I cried

outside her class." Another student was quoted as saying she was a victim of the teacher's harassment tactics, "[i]f I asked her a question, she would come back with something like, 'That's a stupid question.' " Dr. Goldman's daughter allegedly told the reporter that, "[Miss Lipscomb] seemed to hate what I represented, meaning middle-class, bright, articulate, assertive, questioning...I questioned her grades, I questioned her before the others in the class. She really didn't like it [and] she was always chipping away at our self-confidence."

A final student quoted said that the teacher's:

> verbal excess made me bawl right there in class, not once but twice. [Lipscomb's] students in the past year were always unsettled about what she would do next. She is

> just not a teacher. She would assign a test and we'd sit up half the night studying. When we got there in the morning, she'd say we won't take it. No reason. Or she'd just forget assigning us a test. She lost papers we turned in. She's totally unfitted to be in that class.

The negative comments essentially were repeated in the trial testimony of the individuals quoted. On the other hand, a number of students, teachers, and school administrators contradicted those complaints.

Cox essentially confined his investigative activities to interviews with the complaining parents and students and to telephone conferences with Lipscomb's principal and two of Lipscomb's teaching colleagues. He obtained very little information from Lipscomb and the other school employees.

The school board's attorney had advised Lipscomb and certain school administrative officials not to discuss the details of the Goldman complaints because of the law dealing with confidentiality of both student and individual teacher records and his fear of litigation over the Goldman issue with Lipscomb as a possible defendant.

III. WHETHER LIPSCOMB WAS A NEW YORK TIMES "PUBLIC OFFICIAL"

We first consider whether the trial court correctly required Lipscomb to prove publication with a reckless disregard for the truth in her claim for compensatory damages. The answer to this question hinges upon whether the trial court properly classified Lipscomb as a "public official" under the New York Times malice rule.

New York Times prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. "Actual malice" as described in New York Times might be confused with common law malice, which involves "motives of personal spite, or ill-will," The Gazette v. Harris, 229 Va. 1, 18, 325 S.E.2d 713, 727 cert. denied sub nom., Fleming v. Moore, 472 U.S. 1032 (1985); Story v. Newspapers, Inc., 202 Va. 588, 590, 118 S.E.2d 668, 670 (1961). Therefore, we will refer to such actual malice as "New York Times" malice.

The Supreme Court said in New York Times v. Sullivan "[w]e have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule." 376 U.S. at 283 n.23. In Hutchinson v. Proximire, 443 U.S. 111, 119 n.8 (1979), the Supreme Court pointed out that it "has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." Nevertheless, that Court has left little doubt that other courts are to determine who is a "public official" in accordance with "the purposes of a national constitutional protection," Rosenblatt v. Baer, 383 U.S. 75, 84 (1966), and not by reference to state law standards.

The following United States Supreme Court cases give some guidance. In Gertz v. Robert Welch, Inc., 418 U.S. 323 1974, the Supreme Court observed that:

> The first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials...usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Id. at 344 (footnote omitted). The Gertz Court accorded private person status to an attorney who was not on the public payroll. Id. at 352. Although Lipscomb was on the public payroll, we

believe attorneys have significantly more access than teachers to the media and a more realistic opportunity to answer false charges about their competence. We must also keep in mind that Lipscomb probably could not have answered these charges fully without disclosing other students' names and records in violation of Code 522.14287 (1980).[1]

Gertz also noted that "[a]n individual who decides to seek

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1 Code § 22.1-287 provides in pertinent part:

> No teacher, principal, or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school in any process...

This provision is subject to a number of exceptions not applicable here.

governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." 418 U.S. at 344. However, that is only one of the many matters a court must weigh in deciding whether a particular public employee is one classified as a "public official" under the New York Times malice rule. [2]

Other United States Supreme Court cases give further guidance by identi-

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2 We quoted Gertz in support of our finding that a college professor on the state payroll was not a public figure in Fleming v. Moore, 221 Va. 884, 891-92, 275 S.E.2d 632, 637 (1982) cert. denied, 472 U.S. 1032 (1985). However, different considerations determine whether a person is a "public figure" or a "public official" under the New York Times malice rule.

fying and weighing the conflicting interest to be served. Rosenblatt suggested:

> The motivating force for the decision in New York Times was twofold...first, a strong interest in debate on public issues, and second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues... [I]t is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.
>
> Where a position in government has such apparent importance that the public has an independent interest in the qualifications and importance of the person who holds it, beyond the general public interest in the qualifications and importance of all government employees, both elements we identified in New York Times are present...

383 U.S. at 85-6.

Cases construing the "public official" standards of New York Times are legion, but we have found no federal cases concerning school teachers. The state defamation cases are split on the issue of whether public school teachers are "public officials" subject to the New York Times malice rule. [3]

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3 The following cases lend support to the proposition that a public school teacher is a New York Times "public official." See Sewell v. Brookbank, 119 Ariz., 422, 425, 581 P.2d 267, 270 (1978); Gallman v. Carnes, 254 Ark. 987, 992, 497 S.W.2d 47, 50 (1973); Basarich v. Rodeghero, 24 Ill. App. 3d 889, 893, 321 N.E.2d 739, 742 (1974); Luper v. Black Dispatch Publishing Company, 675 P.2d 1028, 1030-31 (Okla. 1983); Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978). On the other hand, the following cases suggest that public school teachers are not New York Times "public officials." Franklin v. Lodge 1108, Benevolent and Protective Order of Elks, 97 Cal. App. 3d 915, 922-24, 159 Cal. Rptr. 131,

There has been no showing that Lipscomb, who was not an elected official, either influenced or even appeared to influence or control any public affairs or school policy. On on the contrary, the evidence shows her to have limited her activities to teaching and acting as a temporary department head of a small number of other English teachers. We also note there was no

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136-37 (1979); Nodar v. Galbreath, 462 So.2d 803, 808 (Fla. 1984); McCutcheon v. Moran, 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133 (1981); Johnson v. Board of Junior College Dist. No. 508, 31 Ill. App. 3d 270, 276 n.1, 334 N.E.2d 442, 447 n.1 (1975); True v. Ladner, 513 A.2d 257, 263-64 (Me. 1986); Milkovich v. News-Herald, 15 Ohio St. 3d 292, 297, 473 N.E.2d 1191, 1195 (1984), cert. denied, Lorain Journal Co. v. Milkovich _____ U.S. _____, 106 S.Ct. 322, overruled, Scott v. News-Herald, 25 Ohio St. 3d 243, 296 N.E.2d 699 (1986); Poe v. San Antonio Express News Corp., 590 S.W.2d 537, 540 (Tex. Civ. App. 1979).

criticism of Lipscomb as an acting department head--it is all leveled at her teaching activities.

Although the article purports to raise the general question of what redress parents of a public school student may have when faced with an allegedly incompetent teacher, it named only one allegedly incompetent teacher and charged specific instances of that teacher's incompetence. Redress through the school system was available to the parents to question individual teacher competence. When Cox and the newspaper chose to assist Dr. Goldman in going beyond his normal remedy by publicizing his dispute, they became subject to the same duty of due care to ascertain the accuracy of their charges that every

citizen must assume when issuing statements, the substance of which makes substantial danger to reputation apparent.

The same reasoning applies to the defendants' contention that because the school system did not respond to Dr. Goldman's satisfaction, the conflict escalated into a public issue of evaluation of teacher competence in general and accountability of the school administration to the parents and students in particular. As Rosenblatt points out, "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 U.S. at 86; n.13 (emphasis added).

We find that the public had no independent interest in Lipscomb's qualifications and performance "beyond its general interest in the qualifications and performance of all government employees," and, therefore, conclude that Lipscomb was not a "public official" under New York Times but a private person. Accordingly, we decide that the trial court erred in requiring Lipscomb to prove New York Times malice before she could recover compensatory damages.

IV. NEGLIGENT PUBLICATION

Because the jury found the plaintiff established New York Times malice, we must next consider whether we properly may enter a judgment for Lipscomb for compensatory damages or

whether the case should be remanded for a new trial on that issue. Upon our request, the parties addressed that question in supplemental briefs filed subsequent to oral argument of the appeal. Two factors influence this determination: First, is a finding of negligence subsumed in a jury's finding of a reckless disregard for the truth? Second, if so, is the evidence sufficient to support a finding that Cox's investigation was negligent?

We described recklessness as a high degree of negligence in Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 212 (1984). As White v. Center 218 Iowa 1027, 1037, 254 N.W. 90, 95 (1934), expresses it, "[o]ne who is guilty of negligence may not be guilty of reck-

lessness, but one who is guilty of recklessness is also guilty of negligence."

We have said, in discussing the survival of common-law qualified privileges in Virginia, that the negligence standard is subsumed in the higher standard of common-law malice. The Gazette, 229 Va. at 18, 325 S.E.2d at 724. And in Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 152, 334 S.E.2d 856, 853 (1985), we found that the trial court improperly imposed the higher standard of New York Times malice upon a private person seeking to recover compensatory damages for defamation. In Great Coastal Express, we conclude the higher standard of New York Times malice subsumed the required negligence stand-

ard and held the lack of a negligence instruction was harmless.

This jury found that Cox acted with reckless disregard for the truth. The jury, and not the court, determines the factual issues of negligence. Therefore, if we find the evidence is sufficient to create a factual issue of Cox's negligence, we will apply the rationale of Great Coastal Express to this case.

Because the trial court did not submit the issue of negligent defamation to the jury, it did not make the required preliminary inquiry of whether "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " See The Gazette, 229 Va. at 11, 325 S.E.2d at 722. We do so now from the record as we

did in The Gazette, 229 Va. at 28, 325 S.E.2d at 733. In this case the inquiry needs little discussion. All parties, including Cox and his editors, recognized a substantial danger of injury to Lipscomb's reputation, raising a duty to investigate the accuracy of the statements made to Cox.

A number of supervisors, a fellow teacher, and students, including some classmates of the complaining students, testified as to Lipscomb's good qualities as a teacher and contradicted virtually all the negative statements made by the persons Cox interviewed. The students who contradicted the negative testimony were all shown to have been readily available for interview in the Richmond area. While the

school authorities would not furnish Cox with the names or addresses of other students in Lipscomb's classes, the jury could have inferred from the evidence that Cox could have obtained this information from the students he interviewed but negligently failed to do so. In fact, one student gave Cox the names of some of the other students, but Cox apparently did nothing with the information.

We find that the jury had ample evidence from which to conclude that a reasonably prudent news reporter writing this article could readily have contacted a number of other students to verify (or contradict) these accusations and should have done so. Moreover, because there is no issue as to Cox's

agency, the newspaper company also is liable for his negligent performance under familiar principles of respondent superior.

V. SUFFICIENCY OF THE EVIDENCE TO SHOW NEW YORK TIMES MALICE

The jury awarded punitive damages against Cox. To sustain that award, Lipscomb, as a private person, is required to establish New York Times malice by clear and convincing proof. Newspaper Publishing Corp. v. Burke, 216 Va. 800, 804, 224 S.E.2d 132, 136 (1976). To decide if that requirement has been met, we conduct an "independent examination of the whole record," The Gazette, 229 Va. at 19, 325 S.E.2d at 727, resolving disputed factual issues and inferences favorably to the plain-

tiff. Lipscomb maintains that Cox's reckless disregard for the truth is demonstrated by a consideration of the following six factors:[4]

(1) Lipscomb says that the ill will Cox's sources bore Lipscomb was of such a character as to raise obvious doubts as to their veracity. A review of the five cases Lipscomb cites in support of this contention demonstrates the insufficiencies of this argument.

The Supreme Court in St. Amant v. Thompson, 390 U.S. 727 (1986), suggested that "recklessness may be found where there are obvious reasons to doubt the veracity of the information or the

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4 We express no opinion on the appropriateness of Lipscomb's six factors as tests for determining the presence of New York Times malice.

accuracy of his reports." Id. at 732. However, the Court in St. Amant concluded that, "[f]ailure to investigate does not in itself establish bad faith...[c]loser to the mark are considerations of [the informant's] reliability." Id. at 733. The Supreme Court then found against the claimant in St. Amant since there was no evidence of the informant's bad reputation for veracity.

In each of the remaining cases cited by Lipscomb, the reporter either had personal doubts about the informant or had been told that the informant was unreliable. Pep v. Newsweek, Inc., 553 F.Supp. 1000, 1002 (S.D.N.Y. 1983); Alioto v. Cowles Communications, Inc., 430 F.Supp. 1363, 1370-71 (N.D.Cal.

1977), aff'd, 623 F.2d 616 (9th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); Burns v. McGraw-Hill Broadcasting Company, Inc., 659 P.2d 1351, 1361-62 (Colo. 1983); Stevens v. Sun Publishing Co., 270 S.C. 65, 71, 240 S.E.2d 812, 815, cert. denied, 436 U.S. 945 (1978).

Lipscomb cites no other United States Supreme Court cases that directly address the issue of ill will or bias affecting credibility. However, the case of Hotchner v. Castillo-Puche, 551 F.2D 910, cert. denied sub nom., Hotchner v. Doubleday & Co., Inc., 434 U.S. 834 (1977), held that proof of ill will or bias on the part of an informant is not sufficient in itself to impute knowledge of probable falsity of the

information. Another New York Times malice case, after reciting the obvious bias of the informants, including the ex-wife of the defamed plaintiff and the ex-husband of his present wife, concluded that this did not automatically disqualify them as legitimate sources of information. Loeb v. New York Times Communication Corp., 497 F.Supp. 85, 92-93 n.12 (S.D.N.Y. 1980).

Except for the bias suggested by their expressions of dissatisfaction with Lipscomb, there is nothing to impeach the credibility of the professor of medicine, the minister, the Richmond school teacher, and the state health department employee, who were the complaining parents, or of their four complaining children. We conclude that

there was insufficient damaging evidence about the informants themselves to provide obvious reasons to doubt their veracity.

(2) Lipscomb claims Cox's testimony demonstrates a predetermination of the facts. The most persuasive testimony we can find to support this assertion is Cox's testimony that when Dr. Goldman first called him:

> He said that he had a story he wanted to talk to me about. And he told me in general about the thing...He indicated enough to pique my interest about the thing...[H]e had considerable documentation to present in this case, an extraordinary amount, obviously of documentation already built up in this case. There was a record there for the picking up. In other words...[h]e said that he thought it had a wide public interest. I thought so myself. I was impressed [by the long document Dr. Goldman had written the school board] and I made a lot of marks on

> this thing...I'm cautious by nature and I considered this document and I considered Dr. Goldman rather carefully. I was interested in the story. I had been thinking about such a story for a long time.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring), and Corabi v. Curtis Publishing Co., 441 Pa. 432, 466 n.20, 273 A.2d 899, 916 n.20 (1971), relied upon by Lipscomb, described "programs" conducted by the publishers to arouse people. The Butts case contained evidence of "an editorial decision...to 'change the image' of the [magazine beginning with] an announcement that the magazine would embark upon a program of 'sophisticated muckraking,' designed to 'provoke people, make them mad.' " 388 U.S. at 169. The evidence in this case discloses no such program conducted by

the defendants; it is essentially limited to a criticism of their handling of this particular article.

Lipscomb refers to three cases in support of her claim that Cox had "predetermined the facts" when he began writing the story and suppressed favorable evidence to achieve that end. A review of the facts in those cases illustrates the failure of Lipscomb's proof on this point.

In Gertz v. Robert Welch, Inc., 680 F.2d 527, 539 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983),[5] the court said:

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5 This case was on appeal from the trial court to which it had been remanded by the earlier decision of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

> In summary, [the editor] conceived of a story line; solicited...a writer with a known and unreasonable propensity to label persons or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory per se of [the plaintiff], and in fact added further defamatory material based on [the writer's] "facts."

In Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir.), cert. denied, 396 U.S. 1049 (1969), the reporter, before beginning any research, solicited comments from Walter Reuther about Senator Goldwater, who had recently won the Republican nomination for the presidency. The solicitation stated in part:

> I'm writing an article for [the magazine] about an old enemy of yours--Barry Goldwater. It's going to be a psychological profile, and will say, basically, that Goldwater is so belligerent, suspicious, hot-tempered, and rigid because he

> has deep-seated doubts about his masculinity.

414 F.2d at 329.

In Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F.Supp. 421 (D.C. Cir. 1972), the reporter who wrote the defamatory story from a press release of defamatory information added his own defamatory information, also determined to be false. The evidence in this case falls far short of that necessary to establish the "predetermination of the facts" referred to in these cases.

(3) Lipscomb argues that Cox not only resolved ambiguities in the story against her but actually omitted information that was favorable. Cox did fail to report that a substantial part of Lipscomb's extended absence from class

was due to the death of her fiance, resulting in a leave of absence, which Lipscomb characterizes as a "brutal twisting of known facts." The omission of this favorable explanation for her absence may have been unfair, but we do not agree that it sufficiently evidenced either the "brutal twisting" claimed or a reckless disregard for the truth.

Lipscomb further accuses Cox of "consistently refusing to include [favorable] information which contradicted the predetermined thesis of the article." She refers only to the information Cox received from her school principal, the school board attorney, and two fellow teachers concerning her excellent qualities as a teacher and her "unblemished record," and then charges

that "[yet] nowhere in the article do these quotes appear."

Examination of the record reveals no testimony from the school principal that he told Cox that Lipscomb was an "excellent teacher with an unblemished record," as Lipscomb claims in her brief, but we note that Cox quoted him in the article as saying that she "was so highly thought of that she was promoted to department head in the past year." The school board's attorney told Cox, "There were people I talked to that thought she was a good teacher"; the article says "school authorities assert that she is a good teacher."

One of Lipscomb's colleagues testified that she told Cox that Lipscomb was "a good teacher of grammar"

and "I thought she was a good teacher" and perhaps she also said that Lipscomb "was a strict disciplinarian." Another teacher was quoted as telling Cox that Lipscomb was a "good teacher of grammar," but this teacher did not testify. The only omission we find is the failure to attribute the appraisal of Lipscomb "as a good teacher" to her fellow teachers, but that laudatory comment could be considered as having come "from school authorities."

Our review of the evidence convinces us that there is insufficient support for this claim.

(4) Lipscomb contends that the absence of deadline pressure "holds a libel defendant more accountable." While the cases cited by the plaintiff

indicate that lack of a deadline is a factor to be considered, in each case there also was other evidence of conduct demonstrating a reckless disregard for truth. See Butts, 388 U.S. at 157; Carson v. Allied News Co., 529 F.2d 206, 211 (7th Cir. 1976); Goldwater, 414 F.2d at 339; Burns, 659 P.2d at 1362 (Colo. 1983); Mahnke v. Northwest Publications, 280 Minn. 328, 340, 160 N.W.2d 1, 12 (1968).

The facts in all those cases give rise to an inference of recklessness in failing to check other sources, apart from deadline pressures. Lipscomb cites no cases, however, where absence of deadline pressure, coupled with a biased source, was sufficient to establish New York Times malice.

Indeed, Tavoulareas v. Piro, 817 F.2d 762, 797 (D.C. Cir. 1971), is to the contrary: "[T]he absence of deadline pressure is probative of nothing," supporting that statement with this footnote: "Absence of deadline pressure has been found relevant in actual malice inquiries only to negate defendants' excuses for inadequate investigation of their stories...No such situation is presented here." 817 F.2d at 797 n.52 (citation omitted). Notably, the Tavoulareas informant was a biased source--the plaintiff's estranged son-in-law. If the evidence available to Cox at the time of writing was legally insufficient to require a further investigation before publication, additional time to do such an investigation has no legal significance.

(5) Doubts of the newspaper staff members as to the accuracy of the story were said to be evidenced by their delay in publishing it until Cox return from a vacation. Cox testified that upon his return his editors had fears and reservations because "[t]hey just wanted to be careful journalists. They wanted to be very, very sure of the sources on this...they wanted their hands held, to be reassured I had done all my work, as an employee, and I was able to tell them, I assume convincingly, that I had done my work, [they] wanted to be sure that what [I] had gotten was accurate and the sources were reliable." This is hardly "sufficient evidence to permit the conclusion that [either of] the defendant[s] in fact entertained serious

[doubt] as to the truth of his publication." St. Amant, 391 U.S. at 731; cf. Tavoulareas, 817 F.2d at 793-94 (an editor's statement, "[i]t's impossible to believe" that the plaintiff set up his son in business in derogation of his fiduciary duty, coupled with a biased source, may have sufficed to show a reckless disregard for the truth if it had referred to a false statement; however, the court found the statement was essentially true).

(6) The evidence is insufficient to support Lipscomb's final charge that Cox threatened and intimidated her, the school board's attorney, and the principal, the only favorable sources cited by her. On the contrary, the

evidence shows that Cox was trying to persuade them to give Lipscomb's side of the controversy.

The school board's attorney testified that Cox told him if "the school system did not make a formal response to this situation, that the article was going to be written and it was going to not look good for the school system or Ms. Lipscomb...he was going to write a story and it was not going to reflect on the school system or Ms. Lipscomb because the implication was the school board would not respond to that."

Lipscomb, when asked if Cox had said, "You really ought to respond to the charges" or words to that effect, replied, "Words to that effect, but it was more or less like an intimidating

thing, like 'you'd better talk to me.' He didn't say, 'You ought to talk to me.' It was more or less an intimidation thing...I just could detect something like a threat in his voice." Cox himself said, "I tried, I tried very hard to tell [Lipscomb] that these were serious charges. And it seemed to me that she ought to respond."

The school principal testified that when he refused to give his views about Lipscomb in connection with the Goldman complaints, Cox "indicated the article would be written with or without my comments, which didn't set too well with me either...he was going to write it with or without my input. He was trying to get my side along with whatever information he had."

We conclude that, even with the bias shown, no one of the six elements charged is legally sufficient to justify a jury's finding of a reckless disregard for the truth. We equally are convinced that a consideration of all these elements as a group demonstrates the same inadequacy. Although we are satisfied that the evidence was sufficient to create a factual issue of negligence, as stated above, we find it insufficient to establish New York Times malice by clear and convincing evidence. Accordingly, we will reverse the award of punitive damages against Cox.

Lipscomb assigned cross-error to the trial court's refusal to submit the issue of the newspaper's liability for punitive damages to the jury. We need

not decide that issue in view of the preceding discussion.

VI. ADMISSIBLITY OF EXPERT WITNESS TESTIMONY

The defendants contend that the trial court erred in excluding evidence from an expert witness, a nationally known journalist, proffered on the standards for investigative reporting. The excluded evidence was an opinion that Cox:

> followed the precepts of fair play and accuracy throughout this and did all of the things that a person should do, that is he took the accusation against the public figure and the public institutions and pursued them to obtain documentation and to also go to the individuals involved and give them every opportunity to explain their side of the accusations [and therefore did not depart] from the standards of journalism relating to investigative reporting.

The standards were described by the witness as:

> developed over a period of years and involve basic accuracy and fairness in articles and the mechanical procedures that will result in accuracy and fair play for all of the people in the stories.
>
> From that standpoint, what one usually starts with is a brief accusation or criticism of a public official, and then you try to make a determination whether there is corroboration for that, use of public records, the use of a wide range of other devices and, in the end, go to those who will be criticized and ask those individuals what their response is to the criticism.

We conclude that the trial court did not err in excluding this evidence for a number of reasons.

First, the issue before the jury was a simple one, essentially whether Cox should have conducted further interviews with other students and parents to meet the standard of due care and to avoid acting with reckless disregard for

the truth. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980), states that the rule:

> [E]xpert testimony concerning matters of common knowledge or matters as to which the jury are as competent to form an opinion as the witness is inadmissible. Where the facts and circumstances shown in evidence are such that men of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom, the opinion of an expert based upon such facts and circumstances is inadmissible.

Id. at 2562, 257 S.E.2d at 803-04. An annotation on this subject includes the three cases cited by the defendants. Annot. 37 A.L.R.4th 987 (1985). It suffices to say that many more cases discussed in this annotation reach the contrary conclusion. In virtually all these cases the issue turned on how much

investigation the reporter should have made before publishing a statement which subsequently turned out to be false, and most of the courts held that a jury was just as capable as an expert of deciding whether the reporter was negligent in failing to make further inquiry. We find that a jury in this state is as competent as any expert to form an intelligent and accurate opinion as to whether a reporter should have conducted additional investigations.

Second, the defense proffered this evidence in an effort to establish a "journalistic malpractice test." We think the adoption of a "journalistic malpractice test" would be inappropriate for a number of reasons:

(a) While responsible newspapers serve many worthwhile objectives, profit is an important consideration. Startling, sensational stories tend to sell more newspapers than dull, factual stories. Thus, there is an inherent conflict of interest when a journalist is required to draw inferences from news items. It seems imprudent to permit media experts to set a standard under these circumstances.

(b) The evidence here does not establish that journalists are required to have special education for their profession,[6] as engineers, doctors, lawyers, or certified public accountants

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6 We note that Cox admitted he took no undergraduate courses in journalism. He received his college degree in economics.

must, nor have they acquired knowledge, training, and experience unique to certain trades focusing upon scientific matters, such as electricity, blasting and the like, which a jury could not understand without expert assistance.

(c) The adoption of such a standard might mean that there could be no recovery unless a media expert testified that the conduct did not meet the standard of care in the journalistic community. See Martin, 549 P.2d at 92. We decline to impose such a requirement.

VII. SEGREGATION OF POTENTIALLY DEFAMATORY MATERIAL FROM MATERIAL OBVIOUSLY NOT DEFAMATORY

Both parties agreed that the jury should see the entire article to determine the context of the particular

defamatory statements. However, Cox contends the court should have winnowed out obviously non-defamatory material in its instructions to the jury.

There are two independent reasons why we find this contention has no merit:

(1) We assume the jury followed the trial court's instructions limiting Lipscomb's right of recovery to defamatory statements of fact.[7] The article contained not only potentially defamatory statements but also statements of opinions, laden with factual content.[8]

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7 No party tendered an instruction informing the jury that it could not award damages for expressions of opinion nor were instructions tendered setting forth how statements of opinion could be distinguished from statements of fact.

8 Many of the potentially defamatory statements about Lipscomb were

It was the jury's function to determine which statements were defamatory statements of fact about Lipscomb, taking into consideration the entire background of the case and the context in which those statements were made. See Zayre, Inc. v. Gowdy, 207 Va. 47,

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intermingled with what were arguably statements of opinion. However, the jury could consider those opinions as "laden with factual content." See Ollman v. Evans, 750 F.2d 970, 982 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985); cf. Chaves v. Johnson, 230 Va. 112, 118-19, 335 S.E.2d 97, 101-02 (1985). It is this feature which distinguishes this case from Ollman and Chaves. In Ollman the majority found the article was confined to statements of opinion that primarily depicted Ollman as a political activist and questioned his intentions as a potential head of a political science department of a college. 750 F.2d at 990-91. Similarly, in Chaves one architect merely characterized a competing architect as inexperienced and as charging excessive fees. 230 Va. at 118-19, 335 S.E.2d at 101.

50, 147 S.E.2d 710, 713 (1966); Powell v. Young, 151 Va. 985, 994, 144 S.E. 624, 626 (1928).

(2) There is no duty upon a trial court to segregate potentially defamatory from non-defamatory material in granting instructions to the jury. See Harvey v. Epes, 53 Va. (12 Gratt.) 153, 184-85 (1855). In Harvey a general motion was made to exclude all parol evidence tending to alter, vary, explain, or add to a written contract between the parties but the trial court refused to do so. On appeal, this Court said:

> [s]ome of the parol evidence was certainly admissible, and therefore it would have been improper to have excluded all. It would have been just as improper to have instructed the jury in general terms to disregard all parol evidence tending to alter, vary, explain or add to the written contracts mentioned in

> the said bill of exceptions. Nor was the court bound to sift the mass of evidence in the case, and determine which would alter, vary, explain or add to the written contracts, and which would not. It was the duty of the parties moving the instruction to point out the particular evidence objected to; and not having done so, the court, on that ground, was justifiable [sic] in refusing to give the instruction.

Id.

VIII. ALLEGED EXCESSIVE DAMAGES

The defendants charge that the verdict for $1,000,000 in compensatory damages and $45,000 in punitive damages was the result of "passion, prejudice, or a misconception of the law" and that the verdict, therefore, should have been set aside in its entirety.

First, they argue that racial prejudice influenced the size of the verdict. Before the trial began, the trial

court recognized that racial considerations might influence the outcome. However, after the trial ended, the court found that those considerations had not influenced the outcome, made a written finding that the jury had shown no "bias or improper motive in making its decision," and refused to set aside the compensatory damage verdict on that ground. Our review of the record demonstrates that the trial court did not abuse its discretion in making this finding.

Second, the defendants contend that the size of the verdict establishes that prejudice, passion, or a misconception of the law influenced both the amount awarded and the jury's determination of liability. While we have found the

evidence insufficient to show a reckless disregard for the truth by Cox, it is more than ample to justify a finding of negligence in his failure to interview other students and school officials before publishing manifestly damaging statements about Lipscomb. Additionally, the trial court failed to find those factors which might indicate that an excessive damage award tainted the finding of liability.

This case is unlike Rutherford v. Zearfoss, 221 Va. 685, 272 S.E. 2d 225 (1980), where the trial court expressly found that sympathy for the plaintiff influenced the finding of liability in a medical malpractice claim. Nor is this case like Rome v. Kelly Springfield Tire Co., 217 Va. 943, 948, 234 S.E.2d 277,

281 (1977), where there was no clear preponderance of the evidence in favor of either party and the damage award was in the exact amount of the lost wages and medical expenses despite the plaintiff's serious and permanent injuries, suggesting that doubt about the liability issue materially influenced the jury.

The defendants cite Ford Motor Co. v. Bartholomew, 224 Va. 421, 297 S.E.2d 675 (1982), but the decision actually supports the action taken by the trial court in this case. There, the jury returned a plaintiff's verdict for $50,000. The defendant moved the trial court to set the verdict aside and order a new trial on all issues, contending that the verdict was so excessive as to

demonstrate the jury had misunderstood the facts and the law. The court refused to set the verdict aside, holding "there is no reason to conclude that an excessive damage award tainted the legitimacy of the jury's finding on liability." Id. at 434-35, 297 S.E.2d at 682. The court did order the plaintiff to remit $33,500 of the award, to which action the plaintiff assigned cross-error. We affirmed across the board. We cannot find in the present case that the trial court abused its discretion in concluding that the jury's finding of liability was not tainted by the excessive award of damages.

The defendants also complain that the size of the final awards - $100,000 in compensatory damages and $45,000 in

punitive damages - was "so out of proportion to the damage sustained as to be excessive as a matter of law." We need not consider further the punitive damage award since we have set it aside.

Cox compares this case to The Gazette where we set aside a jury's award of $100,000 for compensatory damages for defamation, finding it to be excessive as a matter of law. 229 Va. at 48, 325 S.E.2d at 745. Unlike the defamed plaintiff in The Gazette, Lipscomb was substantially and adversely affected by this defamatory publication.

The minister in her church said that she was "totally destroyed and distraught, was withdrawn and afraid... she was not the self-confident and assured...person she had been." He also

said, "She has found it difficult to even attend the worship services let alone participate in the church services [as she formerly did]." Her supervisor at work says she has changed from a "proud, confident person" to one who avoids crowds, does not mingle with people, "has like crawled into a little shell, lost faith in almost anything and everything."

Lipscomb herself said she was unable to read the article without crying, she felt her whole career and life had been destroyed. Lipscomb says she now is very ill at ease in crowds, never knows what poeple are thinking, and "forever live[s] in fear when I go to school and in the classroom that another Dr. Goldman...will crop up and

flash that article in my face." We find that a jury could infer substantial emotional injury from this evidence.

We must necessarily accord the trial court a large measure of discretion in remitting excessive verdicts[9] because it saw and heard the witnesses while we are confined to the printed record. Bassett Furniture v. McReynolds, 216 Va. 897, 912-13, 224 S.E.2d 323, 332-33 (1976). We do not find from this record that the trial judge plainly abused his discretion in setting aside the award of $1,000,000 in compensatory damages or in imposing a remittitur of $900,000 in that verdict.

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9 We are not required to make an independent review of the award of compensatory damages in this defamation case. The Gazette, 229 Va. at 20, 325 S.E.2d at 728.

He carefully reviewed the evidence in a written opinion, considering "factors in evidence relevant to a reasoned evaluation of the damages incurred," id. at 912, 224 S.E.2d at 332, and we will not disturb that finding because "the recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence." Id.

Lipscomb assigns cross-error to the reduction. We believe an award of $1,000,000 clearly would have been excessive. However, the evidence does not demonstrate that the trial court abused its discretion in reducing the award to $100,000.

For reasons assigned, we will affirm the judgment of $100,000 for compensatory damages against both

defendants, will reverse the judgment of $45,000 for punitive damages against Cox, and will enter a final judgment of $100,000 against both defendants.

Affirmed in part,
reversed in part,
and final judgment.

Stephenson, J., with whom Thomas, J., joins, concurring in part and dissenting in part.

RICHMOND NEWSPAPERS, INC., ET AL.

v. Record No. 840737

VERNELLE M. LIPSCOMB

Stephenson, J., concurring in part and dissenting in part.

I concur with the majority's holdings that (1) Lipscomb was not a public official, (2) punitive damages should be denied because the evidence is insufficient to support the jury's finding that Cox acted with "reckless disregard for the truth," and (3) the trial court properly excluded expert testimony.[1] However, I disagree with

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1 I also agree that the trial court properly submitted the entire article to the jury because the statements of opinion contained in the article were "laden with factual content," Ollman v. Evans, 750 F.2d 970, 982 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). I would make clear, however,

the majority's decision to enter final judgment in favor of Lipscomb on the basis of negligence. In my opinion, the majority's ruling on this point is logically flawed.

The majority relies upon Great Coastal Express v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985), as authority for the proposition that a finding of negligence is subsumed in a finding of reckless disregard for the truth. At trial, the plaintiff in Great Coastal was required to prove New York Times malice. On appeal, however, we held that the appropriate standard was negligence. We then pointed out that

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that "[i]t is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion." Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985).

because plaintiff had successfully proved the higher standard, he had necessarily proved negligence. Great Coastal therefore is authority for the proposition that if a plaintiff proves reckless disregard for the truth, he also proves negligence.

Great Coastal cannot serve as authority for the majority's decision in this case, however, because Lipscomb did not successfully prove reckless disregard for the truth. It is one thing to say that proof of a higher standard includes proof of a lower standard. It is quite another thing to say that failure to prove a higher standard includes proof of a lower standard.

Once the majority decided that Lipscomb failed to prove reckless

disregard for the truth, the jury's verdict became null and void. Nevertheless, the majority seizes upon this void verdict as the predicate for ruling, as a matter of law, that negligence was proved. In my opinion, the majority has invaded the province of the jury.

In a case of this complexity, we should permit a properly instructed jury to decide the issue of negligence. Accordingly, I would remand the case for a new trial.

Thomas, J., joins, concurring in part and dissenting in part.

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND
DIVISION I

CASE NO. LF-1112

Vernelle M. Lipscomb,

Plaintiff,

v.

Richmond Newspapers, Inc.,
and
Charles E. Cox,

Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, defendants move the Court for an Order that plaintiff shall be required to prove, by clear and convincing evidence, that the August 16, 1981, article entitled "Questions About Teachers Hard

to Pursue," which is the subject of this action, was published by defendants with knowledge that it was false or in reckless disregard of the truth. As grounds for this motion, defendants state:

1. Plaintiff is a public official.

2. The August 16, 1981, article that is the subject of this action reports on a matter of public or general concern.

RICHMOND NEWSPAPERS, INC.
and CHARLES E. COX

By Counsel

/s/ David C. Kohler
Alexander Wellford
David C. Kohler
Christian, Barton, Epps,
Brent & Chappell
1200 Mutual Building
909 East Main Street
Richmond, VA 23219
804/644-7851
Of Counsel

CERTIFICATE

I certify that a true copy of the foregoing Motion for Partial Summary Judgment was hand-delivered on the 27th day of June, 1983, to John H. OBrion, Jr., Esquire, and Kenneth X. Warren, Esquire, Browder, Russell, Morris & Butcher, 1200 Ross Building, Richmond, Virginia 23219, counsel to the plaintiff herein.

/s/ David C. Kohler
David C. Kohler

RULING OF CIRCUIT COURT OF CITY OF RICHMOND GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND
DIVISION I

VERNELLE M. LIPSCOMB,	Case No. LF-1112
Plaintiff,	
v.	
RICHMOND NEWSPAPERS, INC. and CHARLES E. COX,	
Defendants.	

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE THE HONORABLE WILLARD
I. WALKER, JUDGE

July 18, 1983

Richmond, Virginia

* * * *

THE COURT: Well, counsel, I am going to rule on this, then we are going to have time for you all to get a cup of coffee and see what the agenda will be for the rest of the time we will have.

And I am going to rule that a school teacher, that the plaintiff in this case, and because she is a school teacher, not because she is a department head, although I recognize that as the case, is a public official. And, therefore, that the requirement should be the New York Times standard, particularly, as a media defendant. I don't know that it makes any difference.

I am also going to rely on the Sanders case that the Supreme Court of Virginia meant to apply the constitutional malice standard to areas

involving public or general concern, and that freed of the restraints or restrictions of the Rosenbloom v. Metromedia, Inc., they would nonetheless apply the same standard there as they would to public officials and public figures. And this is a public or general concern area by virtue of Sanders.

We don't know that the Supreme Court would do that, however, I believe that it would. So on two bases I would find this to be a case where constitutional malice must be shown.

We take a brief recess now.

* * * *

[EXCERPTS FROM TRIAL TRANSCRIPTS]

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND
DIVISION I

VERNELLE LIPSCOMB

Plaintiff

v.

RICHMOND NEWSPAPERS, INC.,
AND CHARLES COX

Defendants

TRANSCRIPT OF PROCEEDINGS

August 8-12, 1983

BEFORE: The Honorable Willard Walker,
Judge

* * * *

[Vernelle Lipscomb's Teaching History]

AFTERNOON SESSION

DIRECT EXAMINATION

BY MR. OBRION:

Q You are Ms. Vernelle Lipscomb?

A Yes, I am.

Q Where do you live, Ms. Lipscomb?

A 113 East 37th Street, Richmond, Virginia.

Q Who lives with you?

A I live with my father.

Q What's his name and how old is he?

A His name is Dewey Lipscomb and he is 85 years old.

Q Ms. Lipscomb, it's not polite to ask a lady how old she is but would you tell the jury when you were born, please?

A I don't mind. I am fifty-two years old.

Q Where were you born, please?

A I was born in Richmond, Virginia.

Q Where did you attend high school?

A I attended high school in Richmond, Virginia, Armstrong High School.

Q And in what year did you graduate?

A In 1947.

Q Upon graduation from high school did you go directly to college?

A No, I did not.

Q What was the reason for that?

A My family was not financially able to send me at that time.

Q Did there come a time you did go to college?

A Yes.

Q What college?

A Morgan State College in Bolton, Maryland.

Q What year did you graduate from Morgan State or approximately the year if you remember?

A 1955.

Q And what was your major?

A I majored in English.

Q What was your first teaching position after you graduated from Morgan State?

A My first teaching position was as a long-term substitute at Benjamin Briggs in Richmond.

Q And following substituting you began teaching where?

A Jackson Burley High School, Charlottesville, Virginia.

Q Did you teach at Maggie Walker High School?

A Yes, I did.

Q Could you give us the year you started there and the year you ended at Maggie Walker?

A I started teaching at Maggie Walker in 1959, and I taught there until integration occurred in 1971. Then I went to Thomas Jefferson High School, and I'm currently there now.

Q You have been at Thomas Jefferson since 1971?

A Yes.

Q Now have you taken additional educational courses since you graduated from Morgan State and tell the jury in general what they are and what they consist of?

A I have taken courses in English, education courses, they were taken at the University of Virginia. These were courses taken towards a Master's degree in education in the teaching of English. I did my Master's degree at the University of Virginia in education and the teaching of English. Thereafter, I pursued courses in counseling. I have earned 22 hours towards a Master's degree in that.

Q Now you have taught since 1956, is that correct?

A Yes.

Q Could you estimate for us the number of students that you have taught since 1956?

A I have taught roughly two thousand six hundred. From two thousand six hundred to three thousand students.

Q What kinds of classes have you taught, at what grade levels and what subject matter?

A I have taught from grades nine through twelve in English courses, all phases, one through five. Five means honors courses.

Q Was that true at Maggie Walker and also at Thomas Jefferson - those grades levels and those curriculum levels in grammar and literature and English?

A Yes.

Q Ms. Lipscomb, would you please tell the jury hov you got into education and what motivated you to become a teacher, please?

A Since I vas a little girl I always wanted to become a teacher. I remember distinctly when I used to ask

my mother to have my brother sit quietly or just take a seat so I could teach them. I always wanted to be a teacher. I worked with students, teenagers in Sunday school; I taught Sunday school which I enjoyed enormously, and by doing this, I became closer to students, to teenagers, and this was another thing that served and encouraged me to go on to be a teacher.

Q Ms. Lipscomb, I'd like for you to concentrate primarily on your teaching experiences since the mid-1970's, and I'd like you to tell this jury something about your relationship to the students that you have taught.

A I'd always looked forward to going to school and greeting my students and being with them, and it was a joy to

watch them progress and become successful in life or to branch out and find avenues in which they could better themselves.

I'm particularly glad to see them or to hear about their success. They will come back and tell me about what they are doing. If they are in college they will come back and say, "Thank you, Ms. Lipscomb" and they indicate their gratitude for their experience in having been in my classroom.

Some will come with gifts, some have brought their little children back to see me, and it's just always a joy to see the students whom I have taught and to see they are progressing well and to hear them say, "I remember the things that you have taught me, all that you have done has not been in vain," so it is a joy to get that.

Q What particularly is the role that teaching has in your life? Can you explain how big a part it has in your life?

A Yes. Teaching has a great part in my life. My family, my church, and teaching are the greatest parts of my life.

Q Ms. Lipscomb, I'd like to ask you about some things in this newspaper article, particularly I'd like to ask you about the comment on the second page of the article about your willingness to settle for mediocrity. Tell the jury about the standards you set and whether mediocrity is one of those?

A Certainly not, not mediocrity. I have always instilled in my students that they must work to their level best and always do the best that they can,

and certainly mediocrity is not the best they can do. And I have impressed this upon them. I have tried to make them strive for hard work and be the best of whatever they are, do the best of your ability. Mediocrity certainly did not enter into that realm.

Q The classes you have taught and the individual students, have they responded or reacted to you at the end of the year, and will you tell the jury what the classes have done from time to time?

A From time to time I have at the end of the year, students as a class have given me gifts. I'm wearing a gift now, a cross that one of my classes gave me as a gift of appreciation. I never take it off. I always wear it.

I have china a class has given me. I have many gifts that classes have given me. Through all of them, I do not get a gift through all classes but most of them will give me gifts like a cross or umbrella or gifts of appreciation. I do get gifts from students, individual students with little notes saying, "just to thank you."

* * * *

[Proffered Testimony of
Vernelle M. Lipscomb]

MR. OBRION: I'd like to recall Ms. Lipscomb. It relates solely to whether or not she is a public official, a matter upon which Your Honor has already ruled, and I simply want it in the record for whatever future course of action this case might take.

THE COURT: Ms. Lipscomb, will you come back up?

DIRECT EXAMINATION

BY MR. OBRION:

Q Ms. Lipscomb you are still under oath, and I want you to respond to these questions based on your teaching career and your present job as a schoolteacher.

Have you ever sought or campaigned for any public office?

A No, I have not.

Q Have you ever sought a nomination of any political parties or received a nomination of a political party on an election?

A No.

Q Have you ever been interviewed for television, radio or in the newspapers other than the matter we are here talking about?

A No, I have not.

Q Have you ever appeared or held or called a press conference?

A No.

Q Have you ever had any regular dealings with a radio, newspaper, or television?

A No, I have not.

Q Have you held an elected office?

A No.

Q Do you have any participation in the determination of a budget process for the Richmond Public Schools or the Department of Communicative Arts or something in the City?

A No, I do not.

Q Have you ever supervised a federal or state regulations program?

A No.

Q Have you ever made application for federal grants?

A No, I have not.

Q Have you ever supervised clerical personnel in the school system?

A No.

Q Have you ever interviewed applicants eligible for federal or state programs?

A No.

Q Have you ever supervised payroll grants or loans?

A No.

Q Have you ever been a consultant to the Richmond Public Schools or any other school?

A No.

Q Have you ever appeared before the Richmond Public School Board?

A No.

Q Have you ever been requested to appear before the School Board?

A No.

Q Have you ever appeared before City Council?

A No.

Q Have you ever appeared before any public forum other than your church that you know of?

A No.

Q Have you ever been a representative to any teachers' association or public employees union?

A No.

Q Have you ever served on any standing committee of the Virginia Education Association or the Richmond Education Association?

A No, I have not.

Q Do you direct or supervise any employees of the Richmond School Board?

A No.

Q Do you have anything to do with the preparation of the annual calendar of the Richmond school system?

A No.

Q Have you ever met with or talked with the City manager, the mayor or members of City Council?

A No.

Q Do you have anyhthing to do with assignment of student classes or the schedules of classes?

A No.

Q Do you have anything to do with monitoring personal leave requests of employees?

A No.

Q Are there any newspaper or magazine articles about you personally and as a teacher of which you are aware?

A No.

MR. OBRION: That is the only proffer.

THE COURT: Did you want any inquiry in?

MR. WELLFORD: No, Your Honor.

* * * *

[Percy Hunt]

Q Can you tell the jury her reputation as a teacher and the specific things you observed about her teaching methods?

A When I first arrived at Thomas Jefferson was when I first met her.

Even then she had a reputation for being the English teacher's English teacher, so to speak. Those of us who were new in teaching sought her advice in certain areas, and as far as her methods of teaching are concerned, she seemed to be very well organized and efficient in the performance of her duties.

Q Did you observe her in a classroom situation with students?

A Oh, yes, I--at a later time I had occasion to make observations of that, and in the classroom, yes.

Q Tell us what you could observe about how she interacted with students that you saw?

A Well, first of all her class was extremely orderly. There would be communications and responses between the students and Ms. Lipscomb; there was

also an endless amount of learning. There was not playing or joking around. Everybody was serious just the way she was.

Q Did you see handouts she may have used and did you use those yourself?

A Yes, I did. I made up a handout myself for some of my classes, and I consulted with her in the formation of my own handouts, and I had in my files a copy of one of her handouts which dealt with book reviews.

Q Now you mentioned her interaction with students in class. What about after class or at lunch period? Did you see any students interact with Ms. Lipscomb after the classroom period?

A Yes, very frequently. After school it was a common practice for students to show up in her room but most, more especially for a teacher who was so demanding and exacting, it was kind of a surprise to see so many, so many students return to her room during their own lunch periods to discuss things with her.

Q Now Mr. Hunt, you were on the English faculty from 1975 until you retired, and did you have students who have come to you after having been taught by Ms. Vernelle Lipscomb in English?

A Yes.

Q Could you tell us your observation of those students in terms of what kind of students they were?

A They were for the most part very well versed in grammar, their writings were usually more precise, they showed that they had been trained very well. Usually you could point out who had come through her class. There were, of course, other students that did not come from her that did well, but invariably her students did very well.

* * * *

[George Bowser]

GEORGE BOWSER, being duly sworn, deposed and said as follows:

DIRECT EXAMINATION

BY MR. OBRION:

Q Would you please state your name?

A George Bowser.

Q At Maggie Walker did you have Ms. Vernelle Lipscomb as a teacher?

A Yes, I did in '62.

Q Could you tell us your impressions about Ms. Lipscomb as a teacher?

A At Maggie Walker, one of the teachers I had at the time was Ms. Lipscomb. She taught me tenth grade English. Being a little student in high school just coming from middle school, I was a little excited, but I also was a little scared, and one of my anxieties probably was the fact I had been assigned English, I was assigned the English from Ms. Lipscomb. She had a reputation that followed her.

She had a reputation of being an excellent teacher and of being a very

demanding teacher, being one who demanded we give our best at all times, one who would not tolerate any foolishness, and I still had a whole lot of foolishness about me, but I knew when we went into the classroom I could no longer do this playing I would do. I had been rather fortunate because I could laugh and talk and still do my work. Some students couldn't do that, but I could laugh and talk and joke and still do my work and make an "A" or make a "B."

Q What kind of student were you? I didn't mean to interrupt.

A But at the time I went into Ms. Lipscomb's class, I had to put the laughing and joking and foolishness aside because I heard of her reputation for being a very demanding, no-nonsense

type of teacher and I could appreciate that, and I did appreciate it in the end.

Q Can you tell the jury about the specifics of being in her class?

A Well, I can remember that during the first day of class she would tell us about her expectations of us. She would tell us how she expected us to perform to the best of our ability at all times, that she would not necessarily be our friend, we would not be allowed to do back slapping and laughing and joking and giggling, that it was a very, very serious business.

That we should be honest in our efforts and we should be sincere in our efforts and take on the whole year with honesty and sincerity of effort. Well, we were in our class and we, being tenth

graders, she was trying to strike the fear of getting on the right track, but I do recall that first day with Ms. Lipscomb.

* * * *

[Chrystal Arlette Hill]

DIRECT EXAMINATION

BY MR. OBRION:

Q Please state your name?

A Chrystal Arlette Hill.

Q Could you describe in your own words how Ms. Lipscomb treated you and the other students in the class?

A Ms. Lipscomb is a very soft spoken woman, very feminine and very lady-like. She never raised her voice above a whisper, very quiet. She was respected by all of us. Now she's a

caring person, she really cares about students. She--I got a "D" for the whole year through the course and she often told me, "Chrystal, I know you can do better. I know you can do better," all the time encouraging us and pushing us to do our best.

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[Donna Taylor]

DONNA TAYLOR, being duly sworn, deposed and said as follows:

DIRECT EXAMINATION

BY MR. OBRION:

Q Please state your name?

A Donna Taylor.

Q Could you describe for the jury, please, the relations between you and Ms. Lipscomb and how she treated the students in that class?

A Basically Ms. Lipscomb, she was a calm, quiet person and she was someone you always respected. There were certain things you could tell be her appearance, she was always well-dressed and everything.

She wasn't a teacher who wanted to be your friend because some teachers, they just want to talk about what they have been doing during the day and the night before. She was someone--when I came to her class you would get down to business, and you knew never to yell or do anything wrong in her class because she always gave you one of her looks.

Q What kind of looks would she give you?

A Her eyes would get big and you knew to sit in your seat and get quiet or stop whatever you were doing wrong.

Q How did you get along with that class?

A I got along really well. It helped me out a lot, especially in my freshman year at Norfolk State. It helped me in my first semester in critical analysis and that was reading and then we would write a theme around what the plot was and that type of thing that was in the stories; then my second semester we had to write term papers, and I had learned to do detailed term papers in Ms. Lipscomb's class.

Also my freshman year I had to take a civil service test for my job and I had Ms. Lipscomb's vocabulary, and I now have the job because I passed the test and this helped me a lot.

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[Catherine B. Scott]

CATHERINE B. SCOTT, being duly sworn, deposed and said as follows:

DIRECT EXAMINATION

BY MR. OBRION:

Q You are Ms. Catherine Scott, is that correct?

A Yes.

Q Could you tell how Ms. Lipscomb treated you or the other students based on your observations of that class during the school year?

A Without Ms. Lipscomb I would have had a very difficult time with my preceding years at Thomas Jefferson. As far as behavior in the class, she followed the rules, she strived to get every student in her class to work to his or her potential.

Q Bren, I don't want to embarrass you but what did you finish in your class?

A I was 28th.

Q And were you awarded any kind of award at the end of school?

A Yes, I was. They recognized me because I was in the top four percent of my graduating class.

Q And are you planning to go to college?

A Yes, I am. VCU.

Q Could you describe Ms. Lipscomb's behavior in class in terms of help, relationship to students? How did she teach?

A Her relationship with students was excellent. When she returned graded papers there were always comments to the effect of why you received that grade,

detailed comments. When a student would--One of the major, I think, problems was the choice of words, word content. She did correct all words, said this was not quite right and when I asked what kind of word, I did not have to reiterate the comment on the paper, Ms. Lipscomb knew the comment and she was always there willing after class to help the students, to give them guidance.

Q How about tenth, eleventh and twelfth grade English classes? Did you put to use any of the things you learned from the ninth grade?

A In the tenth grade I had to fall back on Ms. Lipscomb's teaching. My tenth grade teacher would give us assignments, but she expected us to know it and without Ms. Lipscomb's thorough

teaching in the ninth grade, I would not have been able to pass tenth grade English.

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[Christina Kendall]

CHRISTINA KENDALL, being duly sworn, deposed and said as follows:

DIRECT EXAMINATION

BY MR. OBRION:

Q You are Christina Kendall, is that correct?

A Yes.

Q Would you tell the jury, please, how Ms. Lipscomb treated you and the others in the class based on your experience?

A Ms. Lipscomb in every sense of the word was a professional. She let

you know right from the start what the rules were, exactly what she expected from us, how she expected us to work. She was very encouraging all year, always counseling, constantly pushing people to do their best.

I remember a time when she handed out test papers and she said, "Those of you who feel you could have done better on the test, please come back after school, I'm more than willing to spend time with you after school."

I had a job interview around the beginning of May with Philip Morris for this internship, and I was a little nervous about it because there were twelve people up for the position. And I went by to visit Ms. Lipscomb one day and she asked me about it and did I feel confident and I said, "I am not getting

my hopes up because there are so many people."

And she said, "You will get the job. There is just something about you and the way you carry yourself." And she just went on about how I was business-like, and she made me feel a whole lot better about the situation, boosted my self-confidence.

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